Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

CITY OF REVERE, ET AL.,

Petitioners,

v.

T&D VIDEO, INC., D/B/A MOONLITE READER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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Dated: December 27, 2006

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW

I. Whether a manifestly excessive and exorbitant ~~fee petition~~ filed pursuant to 42 U.S.C. Section 1988 can only be denied in its entirety if it "shocks the conscience" of the Court?"

II. Whether a municipal zoning ordinance may, consistent with the First Amendment, effectively prohibit all adult video stores where conventional video stores that have the same adult videos in stock are permitted, resulting in no diminution or suppression of speech?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following entities and individuals are parties to the action:

The members of the Zoning Board of Appeals of the City of Revere, Edward Elfman, Alfred Buccilli, Anthony Giannino, Peter Lattanzi, and John J. Verrengia, were named in their official capacity. Joseph Ferruzzi, Building Inspector of the City of Revere, was also named in his official capacity.

Thaddeus Drabkowski and Del Paone are the shareholders of T&D Video, Inc. d/b/a Moonlite Reader. T&D Video, Inc. is a privately held Massachusetts Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Revere, et al. ("Revere") petition for a writ of certiorari to review the decision of the Appeals Court for the Commonwealth of Massachusetts, entered on June 8, 2006. The Supreme Judicial Court of the Commonwealth declined to review the matter further by denying Revere's application for further appellate review without opinion on September 28, 2006.

OPINION BELOW

The Opinion of the Appeals Court for the Commonwealth of Massachusetts, dated June 8, 2006, Appendix ("App.") C, is reported at 66 Mass.App.Ct. 461, 848 N.E.2d 1221 (2006). The denial of the request for further appellate review was entered without a written opinion and is noted at 447 Mass. 1111, 854 N.E.2d 441 (2006).

JURISDICTION

The Appeals Court issued its decision on June 8, 2006 and Revere timely filed its request for further appellate review with the Supreme Judicial Court on June 28, 2006. The Supreme Judicial Court denied the request for further appellate review on September 28, 2006. This petition is being mailed, by express mail from the United States Postal Service, within ninety days of September 28, 2006 in accordance with Supreme Court Rule 29.2. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(a).[1]

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[1]On December 15, 2006, the Supreme Judicial Court granted an application for further appellate review filed by Respondent T&D Video, Inc. on September 28, 2006. App. F. The grant of

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law. . . abridging the freedom of speech. . . ."

42 U.S.C. Section 1988(b) provides, in pertinent part, that "In any action or proceeding to enforce a provision of [42 U.S.C. Section 1983] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

STATEMENT OF THE CASE

In October of 1993, the Revere City Council considered and passed an amendment to the Revere Zoning Ordinance that became Sections 17.08.065 through 17.08.069 and Section 17.16.045 of the Ordinance (hereafter to be referred to as the "Adult Use Ordinance"). App. 27a-28a. The Adult Use Ordinance provided, inter alia, that adult uses, including an adult video store like the Moonlite Reader, could only be located by special permit in industrial areas of the city, and could not be located within 1000 feet of other adult uses, churches,

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further appellate review was a limited one, however, restricted expressly to the issue raised by T&D Video as to whether its request for fees for the earlier, interlocutory appeal to the Supreme Judicial Court should be allowed in its current fee application. (The Appeals Court had ruled that T&D Video was not entitled to include these fees in its fee application). App. E. The Order for further review is limited, will not affect the final decision of the court in a substantive manner and does not extend the time to file this petition. See *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211, 73 S.Ct. 245, 248, 97 L.Ed. 245 (1952).

playgrounds, schools, residences and certain other uses within Revere. App.28a. The Adult Use Ordinance also contained other restrictions pertaining to lot size, setback requirements and similar land use restrictions. App.28a-29a. The Adult Use Ordinance was enacted to combat the perceived adverse secondary effects of adult uses, such as increased crime, neighborhood deterioration, and the like. App.2a. The purpose of the ordinance was to ensure that, if adult uses were to locate in Revere, that they would be located in non-residential, industrial areas of the city. App.28a.

After construction of its store at 55 American Legion Highway was complete in August of 1994, Respondent T&D Video, Inc. d/b/a Moonlite Reader ("T&D") came forward to reveal its plans to operate an adult video store by applying to the Building Inspector for a sign permit. App. 14a. When told of the use planned for the store, the Building Inspector denied T&D's application for a sign permit, and told T&D that it could not operate an adult use at the premises in conformity with the requirements of the zoning ordinance. App. 14a. T & D then filed an appeal from the decision of the Building Inspector to the Revere Board of Appeals. App. 14a. The Board of Appeal held a hearing on the appeal on October 26, 1994, but before it could release its decision, T&D commenced this action in the Superior Court for the Commonwealth, Suffolk County seeking injunctive relief against Revere, the Zoning Board of Appeals of the City of Revere, Edward Elfman, Alfred Buccilli, Anthony Giannino, Peter Lattanzi, and John J. Verrengia, as members of the Board of Appeals and Joseph Ferruzzi, as Building Inspector of the City of Revere. App. 4a-5a. The Superior Court conducted a hearing on T&D's request for injunctive relief, and, after hearing, released a written opinion granting T&D's request for an injunction against Revere from enforcing its new ordinance against T&D. Appeals

Court Record Appendix ("Rec.") 38-54. In her Memorandum of Decision, the Motion Judge ruled that the Revere Zoning Ordinance appeared to be unduly restrictive and therefore likely violated the First Amendment to the United States Constitution. Rec. 46. Accordingly, she enjoined Revere from enforcing its ordinance during the pendency of this action. Rec. 53-54. Revere promptly filed its notice of appeal from this decision and sought appellate review of the decision of the Superior Court. Rec. 4.

After allowance of Revere's application for direct appellate review, the Supreme Judicial Court heard Revere's appeal from the Order of the Superior Court. See *T&D Video, Inc. v. City of Revere*, 423 Mass. 577 (1996). Concluding that the Trial Judge did not abuse her discretion in granting T&D's request for a preliminary injunction against the enforcement of the zoning ordinance, this Court affirmed the preliminary injunction and dismissed Revere's appeal. App. 13a.

While the appeal was pending, Revere amended its Adult Use Ordinance to make it less restrictive. App. 6a. It reduced the lot size restriction to sixteen thousand to sixty-six thousand square feet. App. 6a. It also redefined an adult video store as having at least twenty percent of its gross sales or inventory consist of adult videos. Trial Exhibits ("Exh.") 251. Under the amended ordinance, conventional video stores could maintain an adult inventory, and so long as it consisted of twenty percent or less of its total inventory, the restrictive provisions of the zoning ordinance would not apply. Exh. 251.

After the conclusion of the appellate proceedings concerning the preliminary injunction, the parties engaged in some pre-trial discovery, consisting of a few depositions and a document production. This discovery phase lasted from approximately October 1,

1996 through November 4, 1999, although there were large periods of inactivity during this time. App. 46a.

On or about May 24, 2001, T&D filed a motion for summary judgment in Superior Court on the merits of its claims. App. 47a. This motion was duly opposed by Revere, using, for the most part, the same materials that it had used in its opposition to the preliminary injunction. App. 47a. After hearing, the Superior Court concluded that the motion must be denied because there were genuine issues of fact left for trial. App. 47a. This phase of the case lasted roughly from November 12, 1999 through January 4, 2002.

The matter was reached for trial on August 6, 2002. Rec. 7. App. 48a. After one day of trial, the case was continued, and after further hearings on August 22, August 23, and August 29, the evidentiary portion of the case concluded. Rec. 7. App. 48a.

As part of the trial evidence, T&D Video offered the testimony of its principal that there were at least four other video stores in Revere that stocked the same adult videos as T&D. Trial Transcript ("Tr.") 43. One conventional video store, Video Craze, had approximately twice the inventory of adult videos as T&D because it was a much larger store, with a very large inventory of videos overall. Tr. 48. The videos offered at the conventional video stores were the same ones as the videos sold by T&D and were purchased from the same distributors. Tr. 43. Based on this testimony, and other evidence, Revere argued at trial that the Adult Use Ordinance did not result in the suppression of speech, and only had an incidental restriction on speech because it restricted only adult video stores like T&D, and not conventional video stores. App. 10a. When the Trial Judge released his decision on October 23, 2002, he rejected this

argument and Revere's other claims in support of the ordinance.

In his ruling, the Trial Judge concluded that the Revere Adult Entertainment Zoning Ordinance precluded the operation of an adult video store at any location in Revere and, therefore, the ordinance violated the First Amendment. App. 9a-10a. Accordingly, he entered a declaration that the ordinance was unconstitutional, and issued an injunction against the enforcement of the ordinance. App. 10a. He also invited T&D to schedule a further hearing before him to assess damages, including reasonable attorneys fees. App. 10a-11a.

Counsel for T&D submitted a request for attorneys fees and costs, in the amount of $1,209,585.33 and the Court conducted an evidentiary hearing on the claim on November 23, 2003. App. 13a.

After hearing, on or about February 9, 2004, the Trial Judge released his decision awarding T&D costs and attorneys fees. App. 12a-25a. As his ultimate conclusion, the Trial Judge awarded T&D attorneys fees in the amount of $868,000, with expert witness fees in the amount of $47,027, for a total award of $915,027. App. 24a-25a. Judgment duly entered on the decisions of the Court on the docket on March 2, 2004 and Revere duly filed its notice of appeal to the Appeals Court from the final judgment.

After full hearing and consideration in the Appeals Court, the Appeals Court released its decision on June 8, 2006. The decision is attached to this application as part of Appendix C and was published at 66 Mass.App.Ct. 461. As its ultimate holding, the Appeals Court concluded that the Adult Entertainment Ordinance violated the First Amendment because the effect of the Ordinance was "to deprive the plaintiff of all locations within Revere

in which it may operate both legally and practicably." App. 40a-41a.

As for the lower court's award of attorneys fees and costs in the amount of $915,027, the Appeals Court vacated this portion of the judgment. Although Revere maintained that the size of the fee requested by T&D was grossly excessive and improperly inflated, the Appeals Court declined to deny the fee request in its entirety. The Court refused to disallow the application because the Court ruled that to do so, the request for fees must "shock the conscience" of the court. App. 43a. The Appeals Court did note, however, that "we are constrained to say that this fee request certainly approaches the outermost parameter that separates an acceptable application from one that 'shocks the conscience.'" App. 43a.

After the release of the decision of the Appeals Court, Revere duly sought further appellate review from the Supreme Judicial Court for the Commonwealth. The Supreme Judicial Court denied Revere's application for further review on September 28, 2006. App. E.

REASONS FOR GRANTING THE WRIT

This petition raises two important issues for resolution. The first issue is whether an exorbitant fee petition must be considered and pared down by the Court rather than disallowed in its entirety. The decision of the Appeals Court, in line with the Fourth Circuit, but contrary to the First, Seventh, and District of Columbia Circuits, requires that a fee petition "shock the conscience" of the court before it could be disallowed. This standard sets the bar too high, and would deprive the courts of a useful remedy when dealing with unduly excessive fee requests.

The second issue is whether a municipal zoning ordinance may effectively bar all adult video stores in the community where there is no net impact on speech because the adult videos are readily available from other sources in the community. The resolution of the Massachusetts courts, denying the community the right to so restrict adult video stores, is contrary to the teachings of *Renton ı Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) and its progeny. If permitted to stand, it will have the effect of requiring communities to create space for adult video stores in their communities. To demonstrate that the holding of the Appeals Court is a distortion of *Renton*, this Court should grant certiorari.

I. THE "SHOCK THE CONSCIENCE" STANDARD CONFLICTS WITH OPINIONS OF MOST OF THE CIRCUIT COURTS

In its decision, the Appeals Court recognized that T&D had filed an "excessive" and "overreaching" fee application with the lower court. Yet it declined to deny all fees to T&D because it concluded that T&D's application did not rise to the level of a petition that would "shock the conscience" of the Court. This standard is too onerous, does not conform with the spirit of prior decisions of this Court, and conflicts with decisions of other federal courts of appeal considering this issue.

This Court's opinion in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.E.2d 40 (1983), established the essential principles with which to evaluate fee applications under 42 U.S.C. Section 1988. Under *Hensley*, a "prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" Id., 461 U.S. at 429. The amount of the fee should be

initially calculated based upon the number of hours reasonably expended multiplied by a reasonable hourly rate. "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." The critical element in any fee application is the exercise of "billing judgment," as "hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Id.* at 434, quoting from *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 401, 641 F.2d 880, 891 (1980)(en banc)(emphasis in original).

Hensley did not specify what the remedy would be if a fee petition were to be submitted that demonstrated a total lack of billing judgment. In this case, although the Appeals Court acknowledged that T&D Video's application was outrageously inflated, it refused to deny the application altogether because it did not "shock the conscience" of the court. This resolution is in conflict with the spirit of *Hensley* and with the holdings of various circuits that have considered the question.

No other circuit, aside from the Fourth Circuit, has held to this stringent standard. For example, in *Brown v. Stackler*, 612 F.2d 1057 (7th Cir. 1980), the Seventh Circuit held that it was appropriate for a District Court to deny all fees to an applicant that had submitted an "intolerably inflated" fee application. Id. at 1057. The Seventh Circuit explained its reasoning as follows:

> Where, as here, the claim is obviously inflated to an intolerable degree, the remedy is plain, and the District Court properly pursued it. If, as appellant argues, the Court were required

> to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place.

Accord, *Lewis v. Kendrick*, 944 F.2d 949, 959 (1st Cir. 1991)("A request for attorneys fees is required to be in good faith and in reasonable compliance with judicial pronouncements, and not an opening gambit in negotiations to reach an ultimate result. The statute gives us discretion, 42 U.S.C. §1988, and the departure here was too extreme to be tolerated"). *Jordan v. United States Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982)(Fee application may be denied in its entirety if manifestly inadequate, "grossly and intolerably exaggerated, or manifestly filed in bad faith"). *Environmental Defense Fund, Inc. v. Reilly*, 1 F.3d 1254, 1258-1260 (D.C.Cir. 1993)("Outrageously unreasonable" fee request may be denied in its entirety).

Even where the decisions of the circuit courts have permitted a fee recovery, the courts have generally articulated the legal standard in the same manner as in *Brown, Lewis, Jordan, and Environmental Defense Fund, supra.* For example, in *Case v. Unified School District No. 233*, 157 F.3d 1243 (10th Cir. 1998), the Tenth Circuit Court of Appeals noted that a court had the authority to deny an "outrageously excessive" fee request in its entirety. Accord, *Loranger v. Stierheim*, 10 F.3d 776, 782 n.8 (11th Cir. 1994)(Other circuits have denied "a request for attorney's fees in its entirety when" the request is "outrageously unreasonable"). In each instance, the court, while noting the punitive effect of such a ruling, expressed

approval for the rule in order to deter the filing of outrageous fee requests. In those particular cases, the fees requested, while excessive, did not rise to the level required to warrant denial of all fees.

Only the Fourth Circuit has adhered to the "shock the conscience" standard as a basis for denying all fees. In *Fair Housing Council of Greater Washington v. Landow*, 999 F.2d 92, 96-97 (4th Cir. 1993), the Court expressly held that the "shock the conscience" standard was the basis for a decision to deny all fees. As the *Landow* court stated, "[W]e hold that a district court may, in its discretion, deny a request for attorneys' fees in its entirety when the request, submitted pursuant to 42 U.S.C. §1988 is so outrageously excessive it 'shocks the conscience of the court.'"

Although the decision to deny all fees is undoubtedly limited to special circumstances, to restrict the exercise of discretion to situations in which the conscience of the court is "shocked" unduly limits an appropriate sanction.[2] In cases such as this one, courts must exercise the power to deny grossly inflated fee petitions. Particularly where the ultimate fee award is rendered against a public authority (and the taxpaying public), courts must take particular care to ensure that counsel for prevailing parties do not overreach. The most effective deterrent to prevent

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[2] The "shock the conscience standard is the one used to determine violations of substantive due process. See e.g. *Rochin v. California*, 342 U.S. 165, 72 S.Ct.205, 96 L.Ed.183 (1952); *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct.408, 1 L.Ed.2d 448 (1957); *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003). This standard is an extremely high one, appropriate for application to substantive due process claims, but ill-fitting when applied to attorneys fee petitions. As in this case, a fee application may be exorbitant and grossly excessive but simply does not "shock the conscience" of the court.

unreasonable requests is the ability to deny all fees. This Court should therefore grant certiorari to resolve the conflict among the circuits and ensure that the ability to deny all fees, although perhaps used sparingly, is in fact available to defeat an exorbitant fee application.

II. THE DECISION OF THE APPEALS COURT FAILS TO FOLLOW THE TEACHINGS OF THIS COURT

T&D was only a prevailing party, and therefore entitled to file an application for attorneys fees, by virtue of the decision of the Court holding that the Revere Adult Use Ordinance was unconstitutional as an unlawful suppression of speech. This conclusion fails to follow the applicable First Amendment jurisprudence of this Court.

The undisputed evidence in the record shows that the adult videos like the ones sold by T&D were readily available at conventional video store outlets. Tr. 43. The record evidence also shows that the videos were readily available from other sources, including the internet. Exh. 112-114. This availability demonstrates that there are reasonable alternative avenues of communication sufficient to satisfy the prevailing rule of law contained in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

The evidence in the record, all of which was adduced by T&D, was that there were at least four other outlets in Revere that stocked the same adult videos as T&D. Tr. 43. One such store, Video Craze, had approximately twice the inventory of adult videos as T&D. Tr. 48. These videos were essentially the same as the ones sold by T&D, and were purchased from the same distributors. The difference was that these other outlets featured adult videos as a small

portion of their overall inventory, as opposed to T&D, which only sold adult videos. Tr. 42-52.

Since the adult videos were available through conventional video stores, the ordinance has the effect of eliminating unwanted secondary effects of adult video stores, without diminishing the availability of speech.

For First Amendment purposes, it is immaterial if the video is available for purchase from a conventional video store, as opposed to an "adult" video store. So long as the speech is available, the First Amendment interests are satisfied. Viewed in this light, the Revere Ordinance is simply a form of business regulation, similar in effect to the one in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). In *Young*, the City sought to separate adult theaters rather than have them concentrated. In this case, the ordinance sought to have adult videos sold, if at all, in the context of a conventional video store, as opposed to an all adult video store. This solution is a rational one directed at the very problem illustrated in this case by T&D's business neighbor. After T&D moved in, the adjoining business, a customs broker, breached its lease for the space next to T&D and moved rather than have to do business next to T&D. Tr. 615-619. The all adult video store brings with it these type of secondary effects, such as driving away other businesses that do not want to locate near such a use. The conventional video store suffers no such difficulties. There is no suppression of speech, as the videos are readily available elsewhere in the city. There is also no net effect on speech, as the volume of videos available does not suffer by confining them to conventional video stores. There is no First Amendment guarantee that adult video stores must be permitted to exist, where the videos are readily available from other sources.

This principle was demonstrated by the Court of Appeals for the First Circuit in *Globe Newspaper Co. v. Beacon Hill Architectural Commission*, 100 F.3d 175 (1st Cir. 1996). In *Globe*, the Commission issued regulations that barred the newspaper company from selling papers from street coin operated news racks. While noting that the news racks were an efficient and cost-effective method of distributing the papers, the Court held that the regulation was constitutionally valid. Even though the regulation banned the street news rack form of distribution in its entirety, there were ample other methods available to the paper to have its product distributed.

This rule has direct application to this case, notwithstanding the decision of the Appeals Court. This is not a case, as suggested by the Appeals Court in footnote 8, App. 39a, that Revere is infringing on "the constitutional right of the plaintiff to speak in a particular way on the theory that others are delivering similar speech in a manner more to the government's liking." It is the essence of every time, place and manner restriction that government restricts speech. See e.g. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989). With its ordinance, Revere was enacting a time, place and manner restriction to further its substantial governmental interests in limiting the severe adverse secondary effects of adult entertainments. *Renton* gives Revere the right to do so, even if the ultimate effect is some restriction on speech. Although the ordinance would curtail T&D's operation, the same adult videos are readily available for sale, consistent with the provisions of the zoning ordinance, at numerous locations throughout Revere. Accordingly, there is no net adverse effect on speech. In these circumstances, the requirement that there be reasonable alternative avenues of communication is satisfied, and the ordinance should be upheld under *Renton* principles.

If permitted to stand, the decision of the Appeals Court will mandate that every community make land available for an adult video use. This Court's cases require no such result. To establish the principle that municipalities do not have to make special allowances for adult video stores, where the videos are otherwise readily available in the community, this Court should grant certiorari to review the decision of the Appeals Court.

CONCLUSION

For each of these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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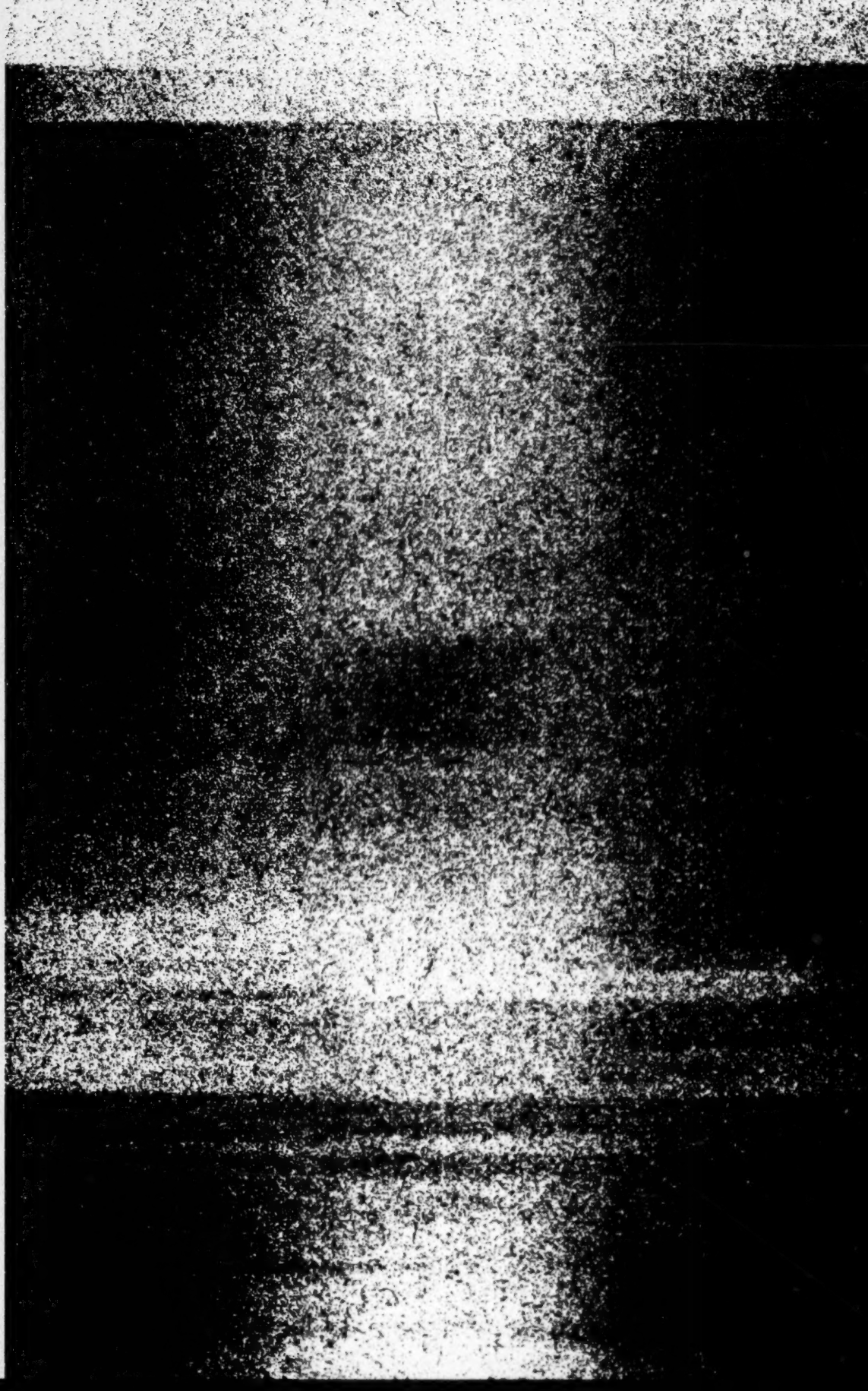

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO. 94-6216A

T & D VIDEO, INC.
d/b/a MOONLITE READER

v.

THE CITY OF REVERE, MASSACHUSETTS,
THE ZONING BOARD OF APPEALS OF
THE CITY OF REVERE, MASSACHUSETTS,
EDWARD ELFMAN, as Chairman of the
Zoning Board of Appeals of Revere,
ALFRED BUCCILLI, as Member of the
Zoning Board of Appeals of Revere,
ANTHONY GIANNINO, as Member of the
Zoning Board of Appeals of Revere,
PETER LATTANZI, as Member of the
Zoning Board of Appeals of Revere,
JOHN J. VERRENGIA, as Member of the
Zoning Board of Appeals of Revere, and
JOSEPH FERRUZZI, as Building Inspector
of Revere

FINDINGS OF FACT, RULINGS OF LAW, AND JUDGEMENT

FINDINGS OF RELEVANT FACTS

1. In September, 1993, T&D Video, Inc., d/b/a Moonlite Reader ("T&D") signed a lease and began preparations to open an adult video store at 55 American Legion Highway, Revere.

2. On September 14, 1993, Thaddeus Drabkowski and Mr. Del Paone, the principals and sole shareholders of T&D, went to the Office of the City Clerk of Defendant City of Revere to complete a business certificate for T&D.

3. The person then working the permitting desk in the City Clerk's Office informed Messrs. Drabkowski and Paone that, before any certificate could issue, they needed to go to the City Solicitor's office to complete a form pertaining to the operation of video stores in Revere.

4. Particularly, Mr. Dabrowski was thereupon told by representatives of Revere that the business certificate would not be granted unless he signed an "agreement" stating that no adult videos or related materials would be sold at the store.

5. Mr. Drabkowski refused to sign the proffered "agreement", but Mr. Dabrowski was ultimately issued a Business Certificate.

6. On September 16, 1993, the Mayor of Revere, Robert J. Haas, Jr., sent to the Revere City Council a proposed "Adult Entertainment" amendment to the Revere Zoning Ordinance which ultimately was enacted as Sections 17.08.065 through 17.08.069 and Section 17.16.045 of the Ordinance.

7. The Adult Entertainment Ordinance was drafted by the City Planner, Mr. Frank Stringi, in response to community concerns about adult entertainment uses gravitating to Revere with the demise of the adult entertainment district -- "the Combat Zone"-- in Boston.

8. In drafting the 1993 Revere adult use zoning ordinance, Mr. Stringi considered Revere's prior experience with adult uses, and the adverse impact upon the City and its residential neighborhoods. The 1993 Ordinance imposed regulations on various types of adult entertainment, including "Adult Entertainment Establishments, adult bookstore[s], adult videostore[s], adult motion picture theater[s], and advertisement signs or devices."

9. In purporting to regulate the various types of adult entertainment, including "Adult Entertainment Establishments, adult bookstore[s], adult videostore[s], adult motion picture theater[s], and advertisement signs or devices," the 1993 ordinance provided operation of these establishments would be allowed by special permit in the General Industrial District only, and only if all of the following minimum criteria were met:

> "A. [The establishments] may not be located less than 1000 (one thousand) feet from the nearest lot line of: each other; public or private nursery schools; public or private day care centers; public or private kindergartens; public or private elementary schools; public or private secondary schools; playgrounds; parks; conservation areas; churches; residential uses; and residential districts.
>
> B. A 30-foot landscaped strip shall be provided along the property line fronting a public or private way.

C. [The establishments] are to be limited to lots greater than 25,000 and not more than 40,000 square feet.

D. [The establishments] may not be allowed in a multi-use building or building containing other retail or consumer uses.

E. [The establishments] shall not be located within 100 ft. of a public or private way and must be set back a minimum of 100 ft. from all property lines.

F. No adult use advertising sign shall contain any moving, flashing or animated lights, or visible moving or movable parts."

10. Through the geometric interplay of the lot size restrictions and set-back restrictions under the 1993 Ordinance, no adult use whatsoever could lawfully be located anywhere in Revere. [Assuming the maximum lot size of 40,000 square feet in a 200 feet by 200 feet configuration, the required set back of 100 feet from all property lines would leave no area on which to locate a structure housing the business.]

11. After renovation of the premises at 55 American Legion Highway was largely complete, in August of 1994, T&D came forward to reveal its plans to operate an adult video, book, and paraphernalia retail store:

12. On September 1, 1994, when told of the use planned for the store, Mr. Joseph Ferruzzi, the

Building Inspector, denied T&D's application for a sign permit, and told T&D it could not operate an adult use at the premises in conformity with the requirements of the zoning ordinance. Among other "violations", T&D's location was within 1000 feet of the Revere High School and residential areas, as well as being outside of the industrial district.

13. After Mr. Ferruzzi, the Building Inspector, denied its application, T & D filed an appeal from the decision to the Revere Board of Appeals in accordance with statutory procedure.

14. The Board of Appeal held hearings on the appeal on October 26 and November 30, 1994, and filed its decision with the City Clerk on December 6, 1994.

15. In its decision, the Board of Appeal noted, inter alia, that T&D could not operate a store in compliance with the zoning ordinance in that it was located in the wrong zone, within 1000 feet of the High School and surrounding residential areas, and in a "multi-use" district.

16. During the course of the proceedings before the Board of Appeal, T & D commenced this action in Superior Court to exempt itself from the application of the Adult Use Ordinance.

17. On January 30, 1995, Councillor Stephen Colarossi circulated a draft ordinance which had the effect of substantially revising the provisions of the 1993 Ordinance.

18 On March 6, 1995 the Revere City Council deleted the 100-foot set-back provision.

19. On May 1, 1995, The City Council repealed the original, (1993), Adult Entertainment Ordinance and substituted in its place Mr Colarossi's draft ordinance.

20. The 1995 Ordinance, currently in effect, limits all adult uses to the General Industrial District (now called the Technology Enterprise District), and requires the granting of a special permit for an adult use. The 1995 Ordinance lowered the set-back requirement to the 50 and 35 feet standards in the so-called "GI District," and revised the lot size restriction to 16,000-66,000 square feet. As did the 1993 Ordinance, the 1995 Ordinance requires all adult uses to be 1,000 feet or more from each other, as well as all churches, schools, parks, playgrounds, conservation areas, residential uses, and residential districts.

21. All but one of the potential sites for adult use in the GI District either do not meet the lot size requirements of the 1995 Ordinance, are otherwise eliminated by the 1,000 foot dispersion requirements and the set-back requirements of the district, or by environmental regulation. The only location that conceptually meets all requirements, 41 Lee Burbank Highway is the subject of past and present petroleum contamination, and is part of a larger parcel owned by Gibbs Oil Company, presently not-subdivided, and which contains large petroleum tanks. The Court finds this location patently unsuitable for the operation of a retail, non-petroleum product-related business.

22.

23. The court specifically credits the testimonies of Mr. Jonathan Witten and Mr. R. Bruce Mclaughlin, both qualified as experts in zoning matters and urban planning, to the penultimate effect that the 1995 Ordinance effectively excluded T&D Video from operation within the C District.

24. Specifically, the court credits the testimony of Mr. Witten, accepted as an expert in zoning matters, who stated the adult use restriction to the general industrial zone and the prohibitions provided in the sub-parts of the ordinances foreclosed the possibility of locating an adult use anywhere in the city, with the exception of 41 Lee Burbank Highway, which Mr. Witten found to be in all likelihood oil-contaminated.

25. Specifically, as dispositive of the issue, the court credits Mr. Whitten's affirmative response to the court's question; "So what you're saying is that under the [old and new] zoning laws there is nothing in the northerly or southerly districts that is suitable with the potential exception theoretically of41 Lee Burbank Highway, which you find to be deficient for other reasons?"

26. The court further credits the uncontroverted testimony of Mr. R. Bruce Mclaughlin to the effect that, never in his review of hundreds of city and town zoning laws had he encountered such minimum and maximum lot size requirements as those contained in the Revere ordinance.

RULINGS OF LAW

1. "Regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). In the present case, a Revere city employee told Drabkowski that, before the city would issue a business certificate, he would have to fill out a form stating that no adult videos or related materials would be sold at his store. Such a form is a prior restraint on speech and violates the First Amendment. Id.

2. Revere's revision of the 1993 zoning ordinance has not rendered the controversy concerning the enforcement of that ordinance against T&D video moot. See City of Richmond v. J.A. Croson, 488 U.S. 469, 478 N.1 (1989) (holding expiration of ordinance does not render controversy moot where ordinance's legality that city enforced against appellee was in question). Revere's reliance on DHL associates Inc. v. O'Gorman, 199 F.3d 50 (1st circuit 1999) to bolster its mootness argument is misplaced. In DHL, the plaintiff could never allege damages from the expired ordinances because the City never enforced the ordinances against the plaintiff. Id. at 54. In the instant case, Revere did attempt enforcement of the 1993 Ordinance when, on September 1, 1994, the city refused T&D's sign permit application and notified T&D that the 1993 Ordinance forbade the proposed adult use of its store. Therefore, because a live controversy then existed between the parties over whether Revere's refusal to grant a permit pursuant to the ordinance was unlawful and thus entitled T&D to injunctive relief and

damages, the action is not moot. See City of Richmond v. J.A. Croson, supra at 478.

3. T&D Video has a constitutionally protected right to engage in the sale of non-obscene "adult" video tapes. T&D Video. Inc. v. City of Revere, 423 Mass. 577, 580 (1996). Counsel for both sides forcefully and ably presented at trial detailed and focused evidence on the issue of the City's "intent" in enacting the Ordinances in question - i.e. whether this court should view the Ordinances as patent prior restraint on speech or merely content-neutral time, place and manner regulation of adult entertainment.
. . . enactment of the 1993 Ordinance, on September 16, 1993, two days after T&D sought a business certificate, evidences Revere's intention to single out T&D. See 754 Orange Ave., Inc v. City of West Haven, 761 F.2d 105,113 (2nd Cir. 1985).

. . . although concededly "content-neutral" [see, e.g., City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728 (2002) alternative avenues of communication of adult-based content unavailable, and not as a reasonable so-called "time, place, and manner restriction." See Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76 (1981). See also City of Los Angeles v. Alemeda Books Inc., supra, at 1737.

4. Because the Revere Ordinances left no such reasonable alternative avenues of communication available, the court does not address the issue, ably contested by both counsel, of whether the secondary effects upon the community of T&D Video's adult video (and associated use) store was primary in the motivation of the City of Revere in passing the Ordinances in question. See Renton v. Playtime

Theatres, Inc., supra at 50 (holding that content-neutral adult theater zoning ordinance must allow for reasonable alternative avenues of communication).

5. Additionally, the site of 41 Lee Burbank Highway is not a reasonable alternative for T&D Video's operations. See Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1532 (9th Cir. 1993) (finding area of oil refinery and area occupied by gas storage tanks properly excluded under Renton as reasonable alternative site); see also Basiardanes v. City of Galvaston, 682 F.2d 1203, 1214 (5th Cir. 1982) (ordinance an effective ban where theaters restricted to most unattractive, inaccessible and inconvenient areas of city).

6. Lastly, evidence that the public may be able to obtain adult videos in conventional video stores does not abrogate T&D Video's rights to compete in the so-called "adult video" business in Revere. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it maybe exercised in some other place." Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76-77 (1981); quoting Schneider v. State, 308 U.S. 147, 163 (1939).

JUDGMENT

It is therefore **ORDERED** that Judgment enter for the Plaintiff in this action, and that Defendants be and they hereby are permanently enjoined from enforcement of the existing Sections 17.08.065 through 17.08.069 (or as the same may have been amended) of the 1995 Zoning Ordinance of the City of Revere against the Plaintiff. A hearing on an Assessment of Damages, including attorneys' fees and

costs in the necessary prosecution of this action, may be scheduled by the Plaintiff before the undersigned.

/s/ Ernest B. Murphy, J.
Ernest B. Murphy, J.
Associate Justice

DATED: October 23, 2002

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
C.A. No. 94-6216A

T & D VIDEO, INC.
d/b/a MOONLITE READER,

vs.

THE CITY OF REVERE, MASSACHUSETTS & OTHERS[1]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND COSTS

On September 14, 1993, plaintiff T&D Video ("T&D") applied to defendant City of Revere to build out and operate an adult video store in Revere. Consequently, the City of Revere implemented zoning ordinances restricting adult entertainment to a certain district and requiring conformity with set-back, space and location provisions. Citing the zoning ordinance as a violation of T&D's First Amendment rights, pursuant to 42 U.S.C. § 1983 and G. L c. 12, §11H, T&D filed for injunctive relief against the City of Revere seeking to enjoin it from enforcing the

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[1] The Zoning Board of Appeals of the City of Revere, Massachusetts, Edward Elfman, as Chairman of the Zoning Board of Appeals of Revere; Alfred Buccilli, Anthony Giannino, Peter Lattanzi, John J. Verrengia, as members of the Zoning Board of Appeals of Revere; and Joseph Ferruzzi, as Building Inspector of Revere.

ordinance.[2] On Oct. 23, 2002, the court entered judgment for T&D, thereby permanently enjoining the City of Revere from enforcing the adult use zoning ordinance because it constituted an unconstitutional prior restraint on speech.

T&D now files this petition seeking an award, as provided by 42 U.S.C. § 1988 and G. L. c. 12, § 11I, for attorneys' fees and costs associated with the prosecution of its complaint against the City of Revere. T&D contends that the City of Revere owes it $1,209,585.33 in attorneys' fees and costs.[3] The City of Revere opposes the petition, arguing that the amount T&D seeks is either so egregiously disproportionate to the reasonable fees and costs required for the prosecution of the matter that the court should deny the petition in its entirety, or, alternatively, that the Court reduce the amount sought substantially, suggesting an award of $50,000.00 to be appropriate.

BACKGROUND

In September 1993, T&D signed a lease and prepared to open an adult video store at 55 American Legion Highway, Revere, Massachusetts. T&D's principals sought a business certificate from the Office of the City Clerk of Revere ("Clerk"). A Clerk employee informed T&D's principals that they would first need to go to the City Solicitors Office to complete a video store business form. Upon T&D's return, the Clerk's office requested that T&D's principals sign an agreement stating that they would not sell adult

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[2] T & D Video, Inc. v. City of Revere & others, 423 Mass. 577 (1996) (affirming that the Superior Court judge did not abuse her discretion when she issued a preliminary injunction).

[3] Attorneys fees total $1,093,626.00; out of pocket expenses total $67,037.77; and expert fees total $48,921.56.

videos or other adult related material. T&D refused to sign the agreement but the Clerk nonetheless issued the business certificate. On September 16, 1993, the Mayor of Revere, Robert J. Haas, Jr., proposed an Adult Entertainment amendment to the Revere Zoning Ordinance. The 1993 Ordinance imposed regulations on various types of adult entertainment.[4]

Once T&D completed renovation, T&D revealed its intention to operate an adult video. book and paraphernalia retail store. Upon review, the Building Inspector denied T&D's application for a sign permit and informed T&D that its proposed business use failed to conform with the new zoning ordinance requirements. After denial of its application, T&D filed an appeal to the Revere Board of Appeals. On October 26 and November 30, 1994 the Board held hearings and subsequently found that T&D's adult video store failed to comply with zoning ordinance requirements.[5]

On January 30, 1995, Revere City Councilor Stephen Colarossi circulated a draft ordinance, which revised the 1993 Ordinance by eliminating certain restrictions. The City Council repealed the 1993 Ordinance and adopted the revised 1995 Ordinance. The 1995 Ordinance lowered the set-back requirements and revised the lot size restrictions. Other restrictions, however, remained in force.

Expert testimony indicated that the 1995 Ordinance essentially restricted adult entertainment venues to a single location, which was unsuitable for a

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[4] The regulations required that adult entertainment establishments could operate only by special permit in the General Industrial District and only if it satisfied certain size and location conditions.

[5] During the proceedings, T&D commenced an action in Superior Court to exempt itself from the application of the Adult Use Ordinance.

variety of reasons. T&D filed for injunctive relief claiming that the zoning ordinance violated 42 U.S.C. § 1983 and G. L. c. 12, § 11H because it did not leave any alternative outlet for its speech. The court (Murphy, J.) permanently enjoined the City of Revere from enforcing its provisions, finding that the zoning ordinance was unconstitutional. In accordance with 42 U.S.C. § 1988 and G. L. c. 12, 11I, T&D filed this petition seeking attorneys' fees and costs associated with the prosecution of its complaint against the City of Revere.

DISCUSSION

Section 1988 of 42 U.S.C., authorizes judges in their discretion to award reasonable attorneys' fees to a prevailing party to any action to enforce a provision of § 1983.[6] 42 U.S.C. § 1988; Perini Corp. v. Comm'r of Revenue, 419 Mass, 763, 772, cert denied, 516 U.S. 822 (1995). This statutory provision endeavors to promote civil rights enforcement and to deter violations of civil rights by encouraging private lawsuits against civil rights abuses. Lincoln St. Realty Co. v. Green, 374 Mass. 630 (1978). The statute entitles the petitioner to an award for attorneys' fees when the court finds that the petitioner is the prevailing party and the court exercises its discretionary authority to award fees in the

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[6] In cases brought under 42 U.S.C. § 1983, though the fee award language of § 1988 states "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" awards in favor of prevailing civil rights plaintiffs are essentially obligatory. Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 293 (1st Cir. 2001). Federal and state civil rights statutes both include parallel provisions for an award of attorneys fees and costs. 42 U.S.C. § 1988; G. L. c. 12, § 11I. Unlike the discretionary language of 42 U.S.C. § 1988, the language in the Massachusetts Civil Rights Act, G. L. c. 12, § 11I, mandates that the prevailing party receive an award for reasonable attorneys' fees and costs. Davignon v. Clemmey, 176 F. Supp. 2d 77, 94 (D. Mass. 2001).

petitioner's favor. Draper v. Town Clerk of Greenfield, 384 Mass. 444 (1981), cert. denied, sub. nom. Draper v. Prescott, 456 U.S. 947 (1982). For the purposes of 1988, the court deems the party a "prevailing party" when it "succeeds on any significant issue in litigation which achieves some of the benefit the [party] sought in bringing suit." Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978).

The party applying for attorneys' fees must first establish its status as the prevailing party." Draper, 384 Mass. at 452. The court considers the applicant the "prevailing party" if it "succeeds on any significant issue in litigation which achieves some of the benefit the [party] sought in bringing suit." Id. at 453. Here, T&D satisfies its status as the prevailing party because this court permanently enjoined the City of Revere from enforcing its Adult Zoning Ordinance, which effectively enabled T&D to open its adult video store.

Denying the Petition Due To Its Outrageous and Unreasonable Claim

Once the plaintiff establishes its status as the prevailing party, as T&D does here, the court's discretion to deny attorneys' fees and costs is "extremely narrow." Espino v. Besteiro, 708 F.2d 1002, 1005 (5th Cir. 1983). The court should award attorneys' fees and costs, pursuant to § 1988, as a matter of course unless special circumstances exist that would render the award unjust. Johnson v. Comm'r of Pub. Welfare, 419 Mass. 185, 191 (1994) (stating that a judge's discretion to deny fees is limited and the prevailing party should ordinarily recover attorneys' fees unless special circumstances render such award unjust).

The City of Revere argues that the court should use its discretion to deny T&D's petition in its entirety because it reflects a total lack of billing judgment and is grossly excessive. In applying 42 U.S.C. § 1988 for an award of attorneys' fees and costs, the court has the discretion to deny an entire fee request if the fee request is "so exorbitant as to shock the conscience of the court. . . ." Sun Publ'g Co., Inc. v. Mecklenburg News, Inc., 823 F.2d 818, 819 (4th Cir. 1987). This extreme remedy seeks to curtail a prevailing party's unethical practice of knowingly submitting an outrageously excessive fee petition as a negotiating strategem "in the hope that the court would award at least some, preferably high, percentage of the requested fee." Fair Hous. Council of Greater Wash. v. Landow, 999 F.2d 92, 98 (4th Cir. 1993).

Federal courts have denied attorneys' fee awards when the court deemed the prevailing party's petition as excessive or egregious. See, e.g., Scham v. Dist. Courts Trying Criminal Cases, 148 F.3d 554 (5th Cir. 1998); Fair Hous. Council of Greater Wash., 999 F.2d at 92; Lewis v. Kendrick, 944 F.2d 949, 958 (1st Cir. 1991); Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980). In these cases, the court was able to articulate special circumstances, which rendered the award unjust. The facts in the present case, however, do not warrant the court using its discretionary authority to deny attorneys' fees because the application of the petitioners falls far short of a "special circumstance" contemplated by the "striking" cases.

The court distinguishes the case at bar from the proffered cases by highlighting important differences. In Scham, the court found that the prevailing party's counsels status as a solo practitioner with one year experience neither justified his $350 per hour billing rate, nor explain his enhanced $750 per hour rate. Scham, 148 F.3d at

557. In contrast, T&D's lead counsel Attorney Glenn Alberich's billing rate, ranging over the course of ten years from $250 to $400 per hour, is not an inordinate rate for a large Boston law firm employing attorneys who have twenty-five years of legal experience. Similarly, in Fair Hous. Council of Greater Wash., the court found that the prevailing party's counsel failed to exclude fees attributable to unsuccessful claims and that counsel's submitted time records were "woefully inadequate." 999 F.2d at 97. Conversely, T&D's counsel received a favorable disposition on its only claim. Additionally, T&D's computer-generated time records, if anything, were overly replete with the minutes description of services rendered.

Considering that T&D hired experienced First Amendment counsel from large Boston law firm and who participated in nearly ten years of prolonged administrative proceedings and litigation, the court finds that the content of the petition for attorneys fees and costs neither rises to the level of a "special circumstance" requiring total disallowance, nor does it shock the conscience of the court." Sun Publ'g Co., Inc., 823 F.2d at 819.

The City of Revere alternatively argues that if the court opts not to use its discretion to deny T&D's petition, this court should at least reduce the award. The court now analyzes the reasonableness of T&D's petition to determine if it is a fair and just award.

Reducing the Amount Sought in the Petition

The City of Revere ("Revere") first argues that this court should reduce the award because T&D's attorneys failed adequately to justify their billable rates. To support its assertion Revere cites Attorney Glenn Alberich's alleged failure to explain his

justification for increasing his hourly billing rate from $250 per hour to $400 per hour. Similarly, Revere contends that T&D failed to explain or justify hourly billing rates for other attorneys who worked on this case.

The fee applicant bears the burden of documenting the applicable hourly rate. Guckenberger v. Boston Univ., 8 F. Supp. 2d 91, 107 (D. Mass. 1998) (citing Missouri v. Jenkins, 491 U.S. 274, 286-287 (1989). Counsel requesting attorneys' fees must establish that their billable rates are in conformity with community market rates. Student Pub. Interest Researce Group v. AT&T Bell Lab., 842 F.2d 1436, 1450 (3d Cir. 1988). An attorney may establish the community market rate by simply submitting affidavits from a number of attorneys who live in the community and possess comparable qualifications and skill." Id.

In the present case, T&D's counsel submitted affidavits from Attorneys Anthony M. Doniger and Kenneth H. Tatarian establishing the community rate standard for civil rights and constitutional rights attorneys. Attorney Doniger stated that the prevailing rate in complex civil litigation cases for attorneys who have Attorney Alberich's legal experience ranged from $375 to $500 per hour, while Attorney Tatarian stated that the prevailing rate, in 1994, ranged from $200 to $400 per hour. Countering, Revere cites case law indicating that $200 per hour is a reasonable rate. Martino v. Mass. Bay Transp. Auth., 230 F. Supp. 2d 195, 205 (D. Mass. 2002).

Revere also argues that the billing record indicates that billable hours were both excessive and duplicative. Specifically, Revere contends that T&D attorneys billed for research hours in the preliminary injunction phase, summary judgment phase and trial phase which went far beyond what was necessary and

appropriate for proper preparation of this case. Similarly, Revere contends that various counsel for T&D billed for the same services without explaining the necessity for its duplicity. Mindful of the need to revisit prior work after the long periods of dormancy of any complicated piece of civil litigation, and after an extensive review of the voluminous time records submitted by petitioners, the court nonetheless finds merit in Revere's assertions that T&D unnecessarily billed for duplicative services. In making this finding, the court does not cast aspersion on the ethics of petitioners' counsel, merely that there is a considerable element of unnecessary duplication in these time records, and that a substantial portion of such duplicative billing must be laid to the inefficiency of petitioners' counsel.

The court extensively reviewed the billing records to determine when and where T&D's counsel "double-billed" its services. Though the court's document review identified many duplicative records, it is virtually impossible to reconcile every single disparity because ten years of litigation produced a voluminous record consisting of thousands of separate entries. The resources available to this court do not permit an examination and reconciliation, with absolute precision of every single disparate entry. It suffices to say that the court did its best.

The court's methodology employed the so-called "lodestar" basis of fee calculation[7], however, and weighed a number of judicially-indicated appropriate factors to determine a fair and just award for T&D's counsel's time and expense in litigating this action. In

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[7] The lodestar approach contemplates judicial ascertainment of the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" as the starting point in constructing fee awards. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

this regard, it is worthy of mention that the undersigned Associate Justice had substantial experience in the trial of civil matters as a partner in a major Boston law firm, practiced trial law in the City of Boston for some thirty years before his appointment to the bench, and thus has significant practical experience in the complexities of so-called "big firm" billing practices.

Lodestar Calculation

The amount of a fee award rests largely within the discretion of the trial judge. Fontaine v. EbtechCorp., 415 Mass. 309, 324 (1993) (finding that the amount of a reasonable attorneys fee, awarded on the basis of statutory authority, "is largely discretionary with the judge"); Linthicum v. Archambault, 379 Mass. 381, 398 (1979). The award amount should, however, be "reasonable" and represent the fair market value of counsel's time reasonably spent on the case. Torres v. Attorney Gen., 391 Mass. 1, 16 (1984). Courts sometimes refer to this measure of the fee award as the "lodestar calculation." See, e.g., Connolly v. Harrelson, 33 F. Supp. 2d 92, 95-96 (D. Mass. 1999) (discussing the "lode-star" calculation process). The court also has discretion to adjust the lodestar up or down, but must justify such only under compelling circumstances. Fontaine, 415 Mass. at 324; Draper, 384 Mass. at 456-457. Courts consider a combination of factors when determining the reasonable fair market value of services.[8] See,

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[8] Among the other factors, the court considers 1) the time and labor required, the novelty and difficulty involved and the skill required to properly perform legal services; 2) the fee customarily charged in the locality for similar legal services; 3) the amount involved and results obtained; 4) time limitations; and 5) the experience, skill and reputation of the attorney. See, e.g., Scham, 148 F.3d at 559 (citing Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)).

e.g., Linthicum v. 379 Mass. at 390; Heller v. Silverbranch Constr. Corp., 376 Mass. 621 (1978).

Calculating reasonable attorneys fees in this fashion requires the court to identify the number of hours billed in the contemporaneous billing records for each attorney and paraprofessional entering time spent working on the case and then to apply a reasonable discount for any time deemed excessive or duplicative. Once the court determines the reasonable number of hours expended, the court simply multiplies those hours by a reasonable hourly rate to achieve the lodestar figure. Determining the reasonable hourly rate requires the court to find the prevailing hourly rate in Boston for persons with comparable skill, experience and reputation as the persons who worked on the case. Blum v. Stenson, 465 U.S. 886, 895 (1984). The court's goal is to fashion an award equal to what the services were objectively worth in the so-called "legal marketplace", as opposed to what other amount the prevailing party's counsel may have billed. Heller, 376 Mass. at 629.

In applying the lodestar calculation, the court also considers the effect of Revere's obstructionist conduct, which the court finds substantially contributed to T&D's alleged accumulation of $1,209,585.33 in attorneys' fees and costs. The court finds that Revere unduly prolonged this litigation by causing delays at various stages during litigation. It was patently obvious to the court that Revere was never interested in resolving this case through settlement or alternative dispute resolution, and that this attitude, politically engendered, obtained long after it was apparent that its actions in framing and attempting to enforce unconstitutional zoning regulations enacted for the sole purpose of "zoning out" T&D Videos proposed use of its premises as an

adult entertainment video and bookstore, were patently illegal.

Additionally, the nature of Revere's constitutional violations contributed to T&D's counsel's difficult and prolonged involvement in the matter. Issues involving First Amendment civil rights are often complex and difficult to resolve against entrenched governmental opposition without the expenditure of prodigious amounts of legal services. Often, as a practical matter, the resources and expertise required to battle for constitutionally-based civil rights reside solely in the capacities, however inefficient, of large law firms, whose cost structures necessarily require premium billing rates.

Expert Fees

Revere argues that 42 U.S.C. § 1988 and G. L. c. 12, § 11I do not allow the prevailing party an award for expert fees. In relevant part, 42 U.S.C. § 1988 permits an award for expert witness fees in excess of statutory limits in "any action or proceeding to enforce a provision of § 1981 or § 1981a . . . ." As T&D brings this action pursuant to 42 U.S.C. § 1983, the statutory provision allowing expert fees is not applicable to T&D's federal claim.

As to T&D's "state" claim, the provisions of the so-called Massachusetts Civil Rights Act do not explicitly permit an award of expert fees.[9] When a Massachusetts statute grants explicit cost-shifting authority, however, it raises a presumption that this court may award expert witness fees upon a

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[9] In relevant part, G. L. c. 12, § 11I states, "[any person whose exercise ... of rights ... has been interfered with ... as described in section 11H may institute and prosecute in his own name ... [and the prevailing party] ... shall be entitled to award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court."

successful Massachusetts Civil Rights Act action. Krewson v. City of Quincy, 74 F.3d 15, 19 (1st Cir. 1996) (citing Linthicum, 379 Mass. at 389). The court adopts this presumption.

Revere argues, pursuant to G. L. c. 12, § 11H, that T&D's state claim is not applicable because a violation of the Massachusetts Civil Rights Act occurs only when the plaintiff presents evidence of "threats, intimidation, or coercion." G. L. c. 12, § 11H. Attempting to enforce the zoning ordinance, Revere asserts, does not constitute a "threat, intimidation or coercion."

Case law establishes, however, that G. L. c. 12, § 11H does not require actual or threatened force; economic coercion is sufficient, Buster v. George W. Moore, Inc., et al., 438 Mass. 635, 648 (2003) (holding that a public university's denial of student organizations use of its facilities constituted a threat, intimidation or coercion). Here, Revere participated in pure economic coercion when it denied T&D the opportunity to operate a lawful business and forced it to enter a "scorched earth" campaign of legal vindication. Accordingly, G. L. c. 12. 11I entitles T&D to an award for expert fees, which this court incorporates in its final lodestar figure listed below.

In consideration of the time expended to resolve this matter, and after careful and exhaustive review of all the billing records and parties' arguments, the court finds that a lodestar calculation of 3100 hours at the average hourly rate $280, equaling a lodestar figure of $868,000 represents reasonable attorneys' fees and costs for litigating this matter. The court has calculated the reasonable "expert fees" incurred in this matter to be in the sum of $47,027. Thus, the total award to petitioners' counsel in the matter is $915,027.

ORDER

For the reasons stated herein, it is hereby ORDERED that defendant City of Revere forthwith pay plaintiff T&D's attorneys' fees and costs in the amount of $915,027 as reasonably and necessarily incurred in the successful prosecution of this matter.

February 9, 2004

/s/ Ernest B. Murphy
Ernest B. Murphy
Associate Justice of the Superior Court

Dated February 9, 2004

APPENDIX C

T & D VIDEO, INC.[1] *vs.* CITY OF REVERE & others.[2]

No. 05-P-109.

Suffolk. December 14, 2005. – June 8, 2006.

Present: LAURENCE, KANTROWITZ, & COWIN, JJ.

Constitutional Law, Zoning, Freedom of speech and press. *Zoning*, Validity of by-law or ordinance. *Evidence*, Relevancy and materiality. *Civil Rights*, Attorney's fees. *Practice, Civil*, Attorney's fees, Costs. *Witness*, Expert, Fee.

CIVIL ACTION commenced in the Superior Court Department on November 16, 1994.

The case was heard by *Ernest B. Murphy*, J., and a motion for attorney's fees and costs was also heard by him.

Ira H. Zaleznik, for the defendants.

Allen C.B. Horsley, for the plaintiff.

COWIN, J. The defendants appeal from a judgment of the Superior Court declaring that defendant city of Revere's adult entertainment zoning ordinances effect unconstitutional restrictions of expression under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, and enjoining enforcement of

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[1] Doing business as Moonlite Reader.

[2] Zoning board of appeals of Revere and the building inspector of Revere.

those ordinances against the plaintiff, T & D Video, Inc. The defendants appeal also from the Superior Court order awarding attorney's fees and costs to the plaintiff.

1. *Background.* We set forth certain underlying facts based on unchallenged findings by the trial judge, supplemented where appropriate by undisputed evidence in the record. We reserve for later discussion in connection with certain issues those facts that the parties do dispute. On September 2, 1993, Thaddeus Drabkowski, a shareholder of the plaintiff corporation, signed a lease on behalf of the corporation as tenant to occupy property at 55 American Legion Highway in Revere. Drabkowski and his fellow shareholder, Del Paone, intended to open at that location an adult video store to be called "Moonlite Reader IV." Drabkowski and Paone began renovating the premises to prepare the space for use as a video store, and visited the Revere city clerk in order to complete a business certificate.

When they requested the appropriate paperwork at the city clerk's office, Drabkowski and Paone were informed that in order to obtain a business certificate for a video store, they first would have to complete additional paperwork from the city solicitor's office. The additional paperwork was an "agreement" stating that no adult videos or related materials would be sold at the store. Drabkowski and Paone refused to sign the agreement, but notwithstanding their refusal, a business certificate dated September 14, 1993, was issued by the city clerk.

On September 16, 1993, the mayor of Revere submitted to ***463** the city council a proposed "adult entertainment" amendment to the Revere zoning ordinance. This amendment was adopted by the city council on November 8, 1993, as §§ 17.08.065

through 17.08.069, and § 17.16.045, of the Revere zoning ordinance.[3] Section 17.16.045 provided:

> "Adult entertainment establishments, adult bookstore[s], adult videostore[s], adult motion picture theatre[s] and advertising signs or devices erected, constructed, placed, altered, converted or otherwise changed may be allowed by special permit in the I [general industrial] District in conformance with the following minimum criteria:
>
> "A. Adult Entertainment Establishments, adult bookstore[s], adult videostore [s], adult motion picture theatre[s] and advertising signs or devices may not be located less than 1000 (one thousand) feet from the nearest lot line of: each other; public or private nursery schools; public or private day care centers; public or private kindergartens; public or private elementary schools; public or private secondary schools; playgrounds; parks; conservation areas; churches; residential uses; and residential districts.
>
> "B. A 30 ft. wide landscaped strip shall be provided along the property line fronting a public or private way.
>
> "C. Adult Entertainment Establishments, Adult Bookstores, Adult Videostores, Adult Motion Picture Theatres and advertising signs or devices are to be limited to lots greater than 25,000 square feet but not more than 40,000 square feet.
>
> "D. Adult Entertainment Establishments, Adult Bookstores, Adult Videostores, Adult

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[3] Sections 17.08.065 through 17.08.069, and § 17.16.045, will hereinafter be referred to as the "adult entertainment ordinances" or the "ordinances." Where necessary, distinctions may be made between the ordinances as adopted in 1993 and as amended in 1995 by referring to them as the "1993 ordinances" and the "1995 ordinances" respectively.

> Motion Picture Theatres and advertising signs or devices may not be allowed within a multi-use building or building containing other retail or consumer uses.
>
> ***464** "E. All advertising signs and adult entertainment uses, adult bookstores, adult videostores, and adult motion picture theatres shall not be located within 100 ft. of a public or private way and must be set back a minimum of 100 ft. from all property lines.
>
> "F. No adult use advertising sign shall contain any moving, flashing or animated lights, or visible moving or movable parts."[4]

These provisions effectively prohibited any adult establishments from operating in Revere because the combination of lot size restrictions and setback requirements rendered it virtually impossible for a structure to be built that did not violate the ordinances. See *T & D Video, Inc. v. Revere*, 423 Mass. 577, 582 (1996).

After renovations on the plaintiff's store had been completed, the store's landlord obtained a retail occupancy permit for the premises. On August 31, 1994, the plaintiff sought a sign permit for the store. The defendant building inspector of Revere denied the plaintiff's application for a sign permit because the store did not comply with the requirements of the adult entertainment ordinances. The denial for the sign permit also notified the plaintiff that its intended use was not permitted at its location. After this denial, the plaintiff appealed to the defendant zoning board of appeals of Revere, which affirmed the decision of the building inspector.

While that appeal was pending, the plaintiff instituted this action against the defendants pursuant to 42 U.S.C. § 1983; G.L. c. 12, §§ 11H, 11I; and G.L.

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[4] Sections 17.08.065 through 17.08.069 define terms used in § 17.16.045.

c. 40A. In this proceeding, the plaintiff seeks a judgment declaring that the adult entertainment ordinances violate its rights under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution, by infringing impermissibly on its freedom of expression, together with an injunction prohibiting the enforcement of the ordinances with respect to the plaintiff's proposed adult video store. A judge of the Superior Court entered a preliminary injunction barring ***465** enforcement of the ordinances against the plaintiff's operation; the order granting the preliminary injunction subsequently was affirmed by the Supreme Judicial Court. See *T & D Video, Inc. v. Revere, supra* at 583.

Shortly after commencement of this action, but prior to entry of the preliminary injunction, the city administration submitted to the city council proposed amendments to the adult entertainment ordinances. The proposed amendments were adopted on May 1, 1995 (following entry of the preliminary injunction). The 1995 ordinances lowered the setback requirement for adult establishments from one hundred feet to thirty or fifty feet, depending on the type of establishment,[5] and revised the lot size requirements for adult video stores from 25,000 to 40,000 square feet to 16,000 to 66,000 square feet.[6] Otherwise, the adult entertainment ordinances largely remained unchanged from the 1993 version. More specifically,

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[5] Under the 1995 ordinances, "adult entertainment establishments" and adult motion picture theaters are required to be set back fifty feet from any public or private way and all property lines; adult bookstores and adult video stores are required to be set back thirty feet from any public or private way and all property lines.

[6] Under the 1995 ordinances, "adult entertainment establishments" and adult motion picture theaters are required to be situated on lots from 22,000 to 66,000 square feet.

under the 1995 ordinances, adult uses remained limited to the I district (later renamed the technology enterprise district); still were required to be 1,000 feet or more from each other as well as from schools, churches, parks, playgrounds, conservation areas, residential uses, and residential districts; and still required a special permit in order to operate.

A jury-waived trial was conducted with respect to the 1995 adult entertainment ordinances. A different judge determined that the plaintiff had a constitutionally protected right to sell adult videotapes that were not obscene, and concluded that the ordinances infringed on this right. Crediting the plaintiff's expert witnesses, the judge found that the combination of the 1995 ordinances and applicable environmental regulations left only one site in Revere where the adult entertainment activity contemplated by the plaintiff would be permitted to take place. This site was 41 Lee Burbank Highway, which the judge found ***466** to be patently unsuitable for the operation of a retail business because it was part of a larger parcel, owned by Gibbs Oil Company, that was not subdivided and that was contaminated by petroleum. The judge found in addition that both the 1993 and 1995 ordinances specifically were directed against the plaintiff. Finding that the ordinances effectively banned the plaintiff's protected speech completely, leaving no reasonable alternative avenue of communication for the adult-based content at issue, the judge ruled that the ordinances were unconstitutional both as an impermissible prior restraint on speech and as an impermissible time, place, and manner regulation. He accordingly permanently enjoined the defendants from enforcing the adult entertainment ordinances against the plaintiff. Relying on 42 U.S.C. § 1988 and G.L. c. 12, § 11I, he ordered further that the defendants pay attorney's fees and costs in the amount of $915,027.

The defendants appeal on the merits and on the fee award. At the outset, they attack the decision of

the trial judge to exclude from evidence eleven allegedly obscene adult videos drawn from the plaintiff's inventory, challenging his determination that obscenity was not an issue in the case. Next, the defendants assert that various findings made by the judge are not supported by the evidence, and that the legal conclusions regarding the constitutional validity of the ordinances that he based on such findings are erroneous. Finally, the defendants assert that the plaintiff's request for attorney's fees was so excessive that it should have been disregarded altogether or, in the alternative, that the award should be reduced. We affirm the judgment, which declared the ordinances unconstitutional as applied to the plaintiff and permanently enjoined their enforcement. We agree with the defendants that the award of attorney's fees and costs is excessive and thus vacate the order on the plaintiff's petition.

2. *Exclusion of videotapes.* The defendants offered in evidence a selection of eleven videotapes purchased at the plaintiff's store, arguing that the tapes were evidence that the plaintiff's speech was constitutionally obscene and therefore not entitled to protection under the First Amendment or art. 16. See *Miller v. California*, 413 U.S. 15, 25 (1973); *Commonwealth v. Trainor*, 374 Mass. 796, 798-799 (1978). The judge excluded ***467** the tapes as irrelevant. The defendants claim that this was error, contending that the obscenity of the material determined the level of protection to which the plaintiff was entitled under the First Amendment and art. 16, and thus the level of scrutiny that should have been applied to the ordinances.

The question whether evidence is relevant is addressed to the sound discretion of the trial judge, and his decision will be reversed only for palpable error. See *McLaughlin v. Vinios*, 39 Mass.App.Ct. 5, 8 (1995). Because the regulatory effort at issue here applies to speech that is not obscene as well as to speech that is, we agree with the judge that the status

of the individual items that are regulated is irrelevant. There was therefore no error.

While obscenity, as defined for constitutional purposes, is beyond the pale of First Amendment protection, adult entertainment that is not obscene is entitled to protection under both the First Amendment and art. 16. See *Schad v. Mt. Ephraim*, 452 U.S. 61, 65, (1981); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991); *Commonwealth v. Sees*, 374 Mass. 532, 537 (1978); *Cabaret Enterprises, Inc. v. Alcoholic Bevs. Control Commn.*, 393 Mass. 13, 16-17 (1984); *T & D Video, Inc. v. Revere*, 423 Mass. at 580. Adult entertainment entitled to such protection includes the showing of adult motion pictures that are not obscene, nude dancing that is not obscene, and the sale of adult videotapes that are not obscene. See *Schad v. Mt. Ephraim, supra; Barnes v. Glen Theatre, Inc., supra; Commonwealth v. Sees, supra; Cabaret Enterprises, Inc. v. Alcoholic Bevs. Control Commn., supra; T & D Video, Inc. v. Revere, supra.* Because the regulation of speech that is not obscene affects fundamental rights protected by the First Amendment and art. 16, the constitutionality of such regulation is assessed under a standard of either strict or intermediate scrutiny. See *Commonwealth v. 707 Main Corp.*, 371 Mass. 374, 380, 357 N.E.2d 753 (1976); *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188, 197 (2005). In contrast, by virtue of its unprotected status, the regulation of obscenity requires no scrutiny of the statute or ordinance under which such regulation takes place. That obscenity may be proscribed by the government is a given. Judicial inquiry is directed not at the government's constitutional power ***468** to regulate, which is established, but rather at the question (often a difficult one) whether the material that the government seeks to regulate is in fact obscene in the constitutional sense.

Here, there seems to be little doubt that the plaintiff's inventory includes material that is not

obscene. Were it to include obscene material as well, such a fact would, as the judge concluded, be irrelevant to an examination of the ordinances. Where the provisions of a regulation could affect both protected and unprotected speech, the regulation is evaluated under the standard applied to protected speech. See *Miller v. California*, 413 U.S. at 23-24; *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-875 (1997). This elevated standard is applied regardless of whether the challenged speech is actually protected; the pertinent question is whether the regulation *potentially* could infringe on constitutionally protected speech, not whether it actually does so. See *Schad v. Mt. Ephraim*, 452 U.S. at 66; *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. at 199-201 & n. 14.

In this case, the ordinances in question applied to all adult entertainment, including that portion of the plaintiff's offerings that is plainly not obscene. Because the ordinances affected speech that is not obscene, and therefore is constitutionally protected, the trial judge properly applied heightened scrutiny. If indeed there is obscenity within the plaintiff's inventory, the defendants may, if they deem it necessary, seek criminal or civil relief. See G.L. c. 272, §§ 28-31. They cannot, however, insulate these ordinances from judicial review, and the judge correctly excluded the allegedly obscene videotapes as irrelevant.

3. *Constitutionality.* "[R]egulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). As had the judge who presided at the preliminary injunction hearing, the trial judge assumed that the ordinances were "content neutral" in that they were not adopted for the purpose of restraining speech on the basis of its content. See *T & D Video, Inc. v. Revere*, 423 Mass. at 581. While it is not altogether clear to us on this record that the

defendants' response was not motivated by distaste for the ***469** plaintiff's activities, we are content to proceed on the same assumption. If so, the defendants permissibly could adopt so-called "time, place, and manner regulations ··· so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton v. Playtime Theatres, Inc., supra* at 47. The government thus may take steps to regulate reasonably anticipated secondary effects of the plaintiff's activities, such as increased traffic, reduced property values, or impact on the character of a neighborhood. See *id.* at 47-50. However, a valid exercise of such authority presupposes that these reasons genuinely formed the basis for the government's action, see *T & D Video, Inc. v. Revere, supra* at 581, and that such exercise does not limit unreasonably alternative avenues of communication, see *Renton v. Playtime Theatres, Inc., supra* at 50, 53-54.

In the present case, the judge did not pause at the question whether the defendants had established the presence of a legitimate governmental interest in regulating secondary effects, commenting only that the parties contested "whether the secondary effects upon the community of [the plaintiff's] adult video (and associated use) store was primary in the motivation of the [c]ity of Revere in passing the [o]rdinances in question." Instead, he moved directly to consideration of whether the ordinances effectively removed all possibility that the plaintiff could operate within the municipality. In concluding that they did, he found that application of the ordinances, in conjunction with existing environmental regulation, precluded the plaintiff's activities in all but a single location, with that location otherwise being "patently unsuitable for the operation of a retail, non-petroleum product-related business." Thus, the ordinances could not be justified as a permissible time, place, and manner restriction. In addition, the judge determined

"that the totality of the evidence demonstrates conclusively that Revere directed the ordinance specifically at [the plaintiff]." He accordingly ruled that because the ordinances effectively banned protected speech, they operated as an impermissible prior restraint.

The essence of the defendants' argument on appeal is that the judge's findings in these respects are not supported by the evidence, and that the unwarranted findings in turn led to erroneous***470** application of constitutional principles. The defendants challenge particularly the findings that the plaintiff was the target of the ordinances and that the ordinances as applied left no area of the city in which the plaintiff legally could locate, thus unreasonably limiting alternative avenues of communication. If, the defendants' argument continues, these findings were wrong, then the ordinances qualified as reasonable time, place, and manner restrictions and did not effect an impermissible prior restraint.

The defendants attack the judge's finding that the adult entertainment ordinances were directed against the plaintiff. The finding seems well supported in the record, given evidence that the ordinances, in their proposed form, were submitted by the mayor to the city council two days after Drabkowski and Paone applied for a business certificate. There was in addition evidence provided by the building inspector that two councillors, after they learned of the plaintiff's proposed operation, stated that the ordinances would be adopted. However, even were the finding permissible, we are not persuaded that it is meaningful. If the plaintiff were the only entity seeking to operate an adult video store in Revere, ordinances regulating such operations could be said to target the plaintiff, but such a characterization would not render otherwise valid restrictions unlawful. Indeed, the motivation for a legislative enactment is generally irrelevant in assessing its constitutionality. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 47-48, quoting

from *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive"). While a political animus against an individual or his speech may have a bearing on whether resulting regulation is in fact content neutral, that is not an issue in this case, and unspoken legislative motivations do not appear to us to be relevant in assessing whether an ultimate legislative product is a permissible time, place, and manner restriction.

Deciding that the ordinances effectively banned the plaintiff's communications in Revere altogether, the judge determined that the ordinances effected an impermissible prior restraint on protected speech. Such a characterization follows inevitably ***471** from a recognition that the plaintiff lawfully could not carry on its communicative activities at all and was thus subject to the most complete prior restraint of which a government is capable. The defendants challenge the finding that the ordinances precluded alternative avenues of communication as not supported by the evidence.

In this regard, the defendants argue that we should conduct an independent review of the judge's finding that the ordinances left no alternative sites on which an adult video store legally could operate because it is a "mixed finding of law and fact" which implicates constitutional rights. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498-511 (1984). The plaintiff contends that independent review is not required because it is necessary only when the decision below limits a plaintiff's constitutional protection and not when the lower court confirms constitutional rights. See *Planned Parenthood Assn./ Chicago Area v. Chicago Transit Authy.*, 767 F.2d 1225, 1228-1229 (7th Cir.1985); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir.1988); *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*,

991 F.2d 154, 160 (4th Cir.1993).[7] The Supreme Judicial Court has not addressed the issue, and we are not disposed to make the attempt to resolve it. We conclude that, even applying the more rigorous standard of ***472** independent review, the judge was justified in finding that the ordinances precluded adult video stores from operating anywhere in Revere.

Independent review requires that we examine the record to determine "whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995). Here, we ask whether the ordinances left any reasonable alternative sites available where adult expression of the type engaged in by the plaintiff could be carried on in Revere. We conclude that they did not. It was reasonable for the judge to credit the testimony of the plaintiff's land use experts: certified land use planner R. Bruce McLaughlin, and Jonathan

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[7] It is clear that the independent review standard applies where the lower court's decision upheld a limit on expressive activity. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567-568 (1995); *Planned Parenthood League of Mass., Inc. v. Bell*, 424 Mass. 573, 579-580, cert. denied, 522 U.S. 819 (1997). The Federal circuit courts of appeals currently disagree, however, on whether independent review should be applied to decisions affirming constitutional expressive rights. Compare *Planned Parenthood Assn./ Chicago Area v. Chicago Transit Authy.*, 767 F.2d at 1228-1229 (Seventh Circuit holds that clear error standard and not independent review applies to lower court's decision restricting government's ability to exclude advertisements based on message); *Daily Herald Co. v. Munro*, 838 F.2d at 383 (Ninth Circuit applies clear error standard to determination that government unconstitutionally has restricted free speech); *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d at 160 (Fourth Circuit applies clear error standard, not independent review, to decision declaring restriction on speech unconstitutional), with *Jones v. Heyman*, 888 F.2d 1328, 1330-1331 (11th Cir.1989) (applying independent review to District Court judgment that restriction on speech was unconstitutional); *Brown v. Palmer*, 915 F.2d 1435, 1441 (10th Cir.1990) (applying independent review where lower court declared restriction on speech unconstitutional).

Witten, also a certified land use planner as well as an environmental engineer, an attorney, and a law professor. Both experts agreed that the adult entertainment ordinances, when combined with existing environmental restrictions, left only one land area in Revere available for adult entertainment, with that location likely contaminated with petroleum. In addition, the location is a portion of an otherwise undifferentiated, larger parcel that has not been subdivided. Furthermore, Frank Stringi, Revere's city planner, conceded at trial that there was no single lot in Revere, other than the aforementioned contaminated land area, on which an adult video store could open under the zoning ordinances without having to obtain either a variance or permission to subdivide from the Revere zoning board. There being no place in Revere that reasonably was available for the use contemplated by the plaintiff, it is clear that the ordinances operated so as to leave the plaintiff no alternative avenues of communication.[8]

In addition, regulations that require permits or licenses before ***473** there can be lawful expression are prior restraints. See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Prior restraints are presumptively invalid and are subject to facial challenges, but may be upheld if they meet constitutional requirements. See *FW/PBS, Inc. v. Dallas, supra; Forsyth County v. Nationalist Movement,*

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[8] It is not an answer that adult videos are found in the inventories of video stores in Revere that feature material other than adult material. The government may not infringe on the constitutional right of the plaintiff to speak in a particular way on the theory that others are delivering similar speech in a manner more to the government's liking. There is a "general rule ··· that the speaker has the right to tailor the speech···· Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., supra* at 573-574.

supra. Under the First Amendment, licensing requirements for adult entertainment are invalid prior restraints if they vest in a government official overly broad discretion to grant the license, if they fail to place a limit on the time within which the decision maker must decide whether a license shall issue, or if they are not subject to ordinary judicial review. See *FW/PBS, Inc. v. Dallas, supra* at 225-226; *Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 779, 781-82 (2004) (overruling *FW/PBS, Inc. v. Dallas, supra*, in part, by holding that ordinary judicial review procedures are adequate and expedited judicial review is not required for adult entertainment permitting requirements).

Even had we concluded that the Revere adult entertainment ordinances qualified as permissible time, place, and manner restrictions, the ordinances still may effect an unlawful prior restraint because they are susceptible to a construction that would permit a ban of even authorized adult uses unless a special permit is granted, while vesting unlimited discretion in the city council to grant or deny such a permit. Subsections (C) and (D) of § 17.16.045 of the 1995 ordinances list conditions that must be met before an adult use permit can be granted. Once those conditions are met, however, pursuant to § 17.48.080 of the Revere zoning ordinance, the city council still has discretion to grant or deny the permit by a two-thirds vote of its members. It is not at all clear that the city council must grant a permit request where the applicant has complied with the ordinances; rather, the city council appears to be free to withhold a special permit for an adult use for any reason. If so, the ordinances invite "illegitimate abuse of censorial power," and would impose impermissible prior restraints even if they were otherwise valid. See *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988).

***474** In summary, we have assumed without deciding that the Revere adult entertainment ordinances are content neutral, and that they

represent an effort by the municipality to combat anticipated secondary effects. We are satisfied on this record that the effect of such regulation, however, is to deprive the plaintiff of all locations within Revere in which it may operate both legally and practicably. As such, the ordinances fail a requirement of permissible time, place, and manner regulation, and effect an unlawful prior restraint upon protected expression. We accordingly conclude that the Superior Court judge properly permanently enjoined their enforcement against the plaintiff.

4. *Attorney's fees and expenses.* Pursuant to 42 U.S.C. § 1988 and G.L. c. 12, § 11I, the plaintiff applied for an award of attorney's fees and expenses totaling $1,209,585.33 ($1,093,626 in attorney's fees, $67,037.77 in expenses, and $48,921.56 in expert witness fees). That portion of the application that relates to attorney's fees seeks an award based on 4,082.8 hours of the time of various attorneys expended on the case from its inception through the Superior Court trial on the merits, including the preliminary injunction proceeding, the defendants' appeal to the Supreme Judicial Court of the preliminary injunction order, discovery, the summary judgment proceeding, and the eventual trial.[9] These events took place over a span of approximately eight years, although there obviously were periods of inactivity throughout.

The trial judge reduced the number of compensable hours to 3,100, finding "that there is a considerable element of unnecessary duplication in these time records, and that a substantial portion of such duplicative billing must be laid to the inefficiency of [the plaintiff's] counsel." He concluded that a reasonable rate was $280 per hour, which he derived by applying a weighted average of the rates charged by

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[9] The plaintiff seeks additional attorney's fees and costs in connection with the present appeal. See *Fabre v. Walton*, 441 Mass. 9, 10 (2004).

the plaintiff's lead counsel (which rates ranged from $250 per hour at the inception of the case to $400 per hour by the end of the Superior Court phase). The judge accordingly awarded attorney's fees of $868,000 (3,100 hours multiplied by $280 per hour), a figure that apparently absorbs out-of-pocket expenses other than expert ***475** witness fees. He allowed an additional $47,027 for expert witness fees,[10] resulting in an overall award of $915,027.

The defendants appeal from the fee award on multiple grounds. They argue first that the fee petition should have been denied outright because it was unconscionably excessive. In the alternative, they contend that the plaintiff failed to satisfy its burden of establishing a reasonable hourly rate for the various attorneys who worked on the case, and that the hours billed to the matter were unreasonable even after the judge eliminated close to 1,000 of them. The defendants argue further that expert witness fees should not have been awarded because they are not authorized under 42 U.S.C. § 1988 in 42 U.S.C. § 1983 cases, and that such fees could not be awarded under G.L. c. 12, § 11I, because the defendants' actions did not constitute "threats, intimidation or coercion" as required for application of that statute. G.L. c. 12, § 11H, inserted by St.1979, c. 801, § 1. The plaintiff counters that the fees and costs awarded by the trial judge were within his discretion, particularly given the adamant refusal of the defendants to compromise their position, even in the face of an adverse Supreme Judicial Court decision, and the resulting prolongation of the proceedings.

Section 1988 of 42 U.S.C. provides that the prevailing party in a civil rights action brought under 42 U.S.C. § 1983 may recover reasonable attorney's fees, subject to the discretion of the trial judge. That the plaintiff is the prevailing party here is not

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[10] His decision does not disclose why the amount sought ($48,921.56) was reduced.

disputed. While the language of § 1988 is permissive, case law has established that awards of fees to prevailing civil rights plaintiffs are "virtually obligatory," *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 293 (1st Cir.2001), absent "special circumstances," *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). A judge may deny in its entirety a request for an award of fees only if the amount that the prevailing party requests is so "unreasonable" and exorbitant that it "shocks the conscience," or if counsel makes no good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. See *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir.1980); ***476** *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir.1991); *Fair Hous. Council v. Landow*, 999 F.2d 92, 96 (4th Cir.1993); *Scham v. District Cts. Trying Criminal Cases*, 148 F.3d 554, 558 (5th Cir.1998).

We reject the defendants' contention that an award of attorney's fees should be denied altogether. In so concluding, we nevertheless are constrained to say that this fee request certainly approaches the outermost parameter that separates an acceptable application from one that "shocks the conscience." Nevertheless, having in mind the objectives of fee-shifting statutes in general and § 1988 in particular, which include the legislative interest in inspiring legal actions directed to the identification and elimination of civil rights abuses, we believe that it would be inconsistent with those legislative concerns to refuse to allow any attorney's fees at all on this record.

We turn, therefore, to an evaluation of the specifics of the application. In our view, the number of hours for which compensation is sought (4,082.8) is excessive by any rational standard, and the reduction by the trial judge to 3,100 hours is inadequate to correct the overreaching. We question as well the employment of an imbedded rate of $280 per hour as a reasonable rate without reference to the skills or

experience of the attorneys who contributed 1,810.8 of the hours in question.[11]

Where the trial judge allows a fee petition to a prevailing party, the amount allowed must be reasonable. To determine what amount is reasonable, the court generally engages in a "lodestar" analysis, see *Hensley v. Eckerhart*, 461 U.S. at 433-437; *Gay Officers Action League v. Puerto Rico*, 247 F.3d at 295, the essence of which is the multiplication of the "number of hours reasonably expended on the litigation" by "a reasonable hourly rate." *Hensley v. Eckerhart, supra* at 433. In making this calculation, the court should consider the time counsel spent on the case exclusive of hours that are excessive, redundant, duplicative, or unproductive. See *id.* at 434; *Gay Officers Action League v. Puerto Rico, supra*. The rate applied to the reasonable hours expended should be the prevailing rate in the community, taking into account the experience and qualifications***477** of the attorneys involved. See *Gay Officers Action League v. Puerto Rico, supra*. The fee applicant bears the burden of documenting in detail the hours expended and of establishing the market rate. See *Blum v. Stenson*, 465 U.S. 886, 898 (1984); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir.1984). After making its initial calculation, the court then may adjust the fee upward or downward based on other considerations, including the results obtained. See *Hensley v. Eckerhart, supra* at 434-435. Massachusetts cases governing attorney's fees awards reflect similar considerations. See *Linthicum v. Archambault*, 379 Mass. 381, 388-389 (1979); *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 325-326 (1993).

With these criteria in mind, we consider the nature of the case and the legal services reasonably

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[11] The figure of 1,810.8 hours is derived by subtracting the hours attributed to lead counsel (2,272) from the total hours for which compensation is sought (4,082.8).

required. Lead counsel for the plaintiff, H. Glenn Alberich, is a well-known, experienced practitioner with respect to the First Amendment and its application to government action that may have an impact on protected expression. His hourly rates presumably reflect the demand for his services and the amount clients are willing to pay for his representation. Furthermore, it is reasonable to assume that both he and his law firm market themselves as a place to go on First Amendment questions because of Mr. Alberich's expertise and reputation.

The counterpart to such skills, and the increased compensation that they command, is that a client (and by extension, an opposing party subject to a fee award) should receive the benefit of the attorney's expertise in the form of at least some reduction in the amount of time that an attorney of lesser experience with the subject matter would have to expend. This is particularly so in this case. Insofar as the governing law is concerned, nothing decided in the Supreme Judicial Court, in this court, or in the Superior Court is new. Principles governing adult entertainment zoning and its First Amendment implications effectively were established well before this case was commenced. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 47-48. While the subject certainly is not simple, and application of the relevant law can be complicated, attorneys who hold themselves out as experts in the field presumably already have overcome the difficulties that would require considerable study and preparation by less experienced counsel.

***478** It is for these reasons that we are mystified by the number of hours for which compensation is sought. While the trial judge made a real effort to remove various redundancies, we think that that kind of fine probing of individual entries in the time records may, as it often does with large fee applications, have missed the forest for the trees. We

believe that, at least in this case, the application is evaluated more effectively by examining the various component parts.

The plaintiff seeks approximately $100,000 for the preliminary injunction phase of the case in Superior Court, an amount that, while perhaps not intolerable, is high for the effort reasonably required. Furthermore, we are not inclined to award any fees for the appeal to the Supreme Judicial Court of the preliminary injunction order. That court awards attorney's fees where appropriate in its own cases, and has procedures for doing so. See *Fabre v. Walton*, 441 Mass. 9, 10-11 (2004). There is no mention of a fee award in the Supreme Judicial Court's decision, see *T & D Video, Inc. v. Revere*, 423 Mass. at 583, and any request for fees in connection with that appeal should have been submitted there. Thus, the amount sought for the appeal of the preliminary injunction order (an additional $100,000) should have been rejected.[12]

Following the entry of the preliminary injunction and the affirmance thereof, there was an extended period of discovery. For discovery conducted between October, 1996, and November, 1999, the plaintiff seeks reimbursement for approximately 365 hours, generating bills of more than $100,000. By October, 1996, the hearing on the preliminary injunction prayer had been conducted in the Superior Court and that court's order had been affirmed by the Supreme Judicial Court. That means that there already had been considerable development of the factual positions and the supporting evidence of the parties, particularly on the plaintiff's part, to establish the likelihood of success on the merits, a critical element in a request for preliminary injunctive relief. The plaintiff has not satisfied its burden of demonstrating that the extent of discovery for which it

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[12] We make no comment on the merits regarding a charge of almost $100,000 to defend an appeal of an order granting a preliminary injunction.

was responsible during *479 the subsequent three-year period was justified by the reasonable requirements of litigating this case.

Subsequently, between November, 1999, and January, 2002, the plaintiff's attorneys billed over $300,000 for which they seek reimbursement in connection with the prosecution of a motion for summary judgment. While the plaintiff may have been encouraged to seek summary judgment by virtue of its success in obtaining a preliminary injunction and in the appeal therefrom, it is also a fact that the defendants already had amended the adult entertainment ordinances in an effort to meet some of the deficiencies on which the earlier version had failed. Cases of this nature are often fact-specific because the ways in which a given zoning ordinance affects the rights of given property owners or users will vary with circumstances and frequently will be the subject of good faith disputes. Summary judgment for the plaintiff, while perhaps not impossible, see *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991), was a longshot, and eventually was denied. We are not prepared to award fees exceeding $300,000 for a summary judgment motion that involved legal principles well known by the plaintiff's attorneys, as well as facts that already had been tried in large part in the preliminary injunction proceeding, where that motion had a questionable likelihood of success from the beginning.

Over and above the amount sought for the preliminary injunction phase of the case, together with the amounts sought for defense of the defendants' appeal of the injunction order, discovery, and the summary judgment proceeding, the plaintiff seeks more than $500,000 for the preparation for, and the conduct of, a jury-waived trial that consumed less than four full trial days and that traversed much of the ground already covered during the preliminary injunction hearing. We have not been shown anything that comes close to an explanation why professional

services reasonably required in connection with the trial called for an expenditure of one-half of $1 million.

The plaintiff defends the fee application in part on the basis of the judge's finding that the defendants' conduct was "obstructionist," and that the defendants unduly prolonged the litigation. If that is so, such tactics will result in an increase in *480 the number of hours that the adverse party reasonably must expend in order to prevail, and accordingly will bring about an increase in the amount of fees awarded. Contumacious behavior by a defendant does not call automatically for a premium over and above the number of additional hours that such behavior has made reasonably necessary. Furthermore, had the defendants' conduct been truly obstructionist, the plaintiff had an available remedy under G.L. c. 231, § 6F, which it could have pursued in the Superior Court but did not. The plaintiff justifies its position also by assigning weight to the fact that it has not sought compensation for an additional 452.5 hours, valued at $150,626.50, that it voluntarily removed from its application. The simple answer to that is that the forgoing of an opportunity to make an excessive fee request even more excessive is hardly a defense to an overreaching application. Finally, the plaintiff points to the eight-year life of the case from its inception to the trial on the merits. As we have indicated, the length of the case is reflected in the number of hours reasonably devoted by counsel, and does not require the addition of a premium.

Addressing the subject of an appropriate hourly rate, the record shows that the plaintiff's lead counsel, responsible for 2,272 of the 4,082.8 hours for which fees are sought, charged between $250 and $400 per hour at various stages of the proceeding. Affidavits of attorneys knowledgeable with respect to the local culture regarding fees charged in civil rights cases supported these rates, the judge implicitly accepted them, and that finding is warranted. By contrast, the plaintiff offered nothing regarding the levels of skill or

experience of the remaining attorneys responsible for 1,810.8 of the hours set forth in the application. We know nothing of their years in practice, the kind of practice in which they have been engaged, their experience in this kind of litigation, or anything else that might guide us in determining appropriate hourly rates for their services. If inexperienced with regard to the subject matter, they were not entitled to educate themselves at the expense of the client (or, as in this case, the adversary). See *Matter of Fordham*, 423 Mass. 481, 490 (1996), cert. denied, 519 U.S. 1149 (1997). The judge dealt with the problem by deriving an over-all average hourly rate of $280 and applying it across the board to everything, including both ***481** the work of lead counsel and the work of all other attorneys. While this has the virtue of a rough-and-ready simplicity that fortuitously may do justice, we prefer an approach, at least in a case of this nature where lead counsel is such a significant figure in the process, that separates the rate awarded to lead counsel from the rate or rates awarded to others.[13]

We consider the problem of applying these considerations to the actual fee application. There is some precedent for making the determinations ourselves based on our familiarity with the record and our awareness of prevailing standards in the relevant legal community. This practice is often followed in the Federal courts. See *Lipsett v. Blanco*, 975 F.2d 934, 943-944 (1st Cir.1992); *Gay Officers Action League v. Puerto Rico*, 247 F.3d at 299. However, we believe it to be the better practice in normal circumstances to remand so that the matter can be reconsidered by the trial judge. That judge, having presided at the trial

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[13] In arriving at his fee award, the trial judge folded the plaintiff's expenses (apart from expert witness fees) into the total. We believe that the plaintiff is entitled to separate reimbursement for expenses reasonably incurred. Its application sets forth a total of out-of-pocket expenses apart from those associated with expert witnesses of $67,037.77. On remand, the trial judge should determine which of these expenses should be reimbursed.

and related proceedings, is in a superior position to undertake the evaluation of legal services rendered and to make the specific findings. The judge shall be free to act on the present record or to seek amplification of it as he sees fit.

5. *Expert witness fees.* We are left with the question of how to treat the expert witness fees for which the plaintiff seeks reimbursement of an additional $48,921.56. The judge recognized that expert witness fees in cases under 42 U.S.C. § 1983 are not allowable costs under 42 U.S.C. § 1988 beyond the level set forth in 28 U.S.C. § 1821(b). See *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444-445 (1987). Such fees may be reimbursed under the Massachusetts Civil Rights Act (Act), and the judge did so (allowing $47,027). See G.L. c. 12, § 11I. The defendants contend that this award was impermissible because the plaintiff did not make claims under the Act, the case was not tried on that theory, and the judge erred in any event in determining that the defendants had violated the Act. We pass the first two grounds because we ***482** conclude that the evidence did not warrant a finding in the plaintiff's favor under the Act, and thus expert witness fees could not be awarded.

To recover under the Act, the plaintiff had to prove "that (1)[its] exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by 'threats, intimidation or coercion.' " *Swanset Dev. Corp. v. Taunton*, 423 Mass. 390, 395 (1996), citing G.L. c. 12, § 11I. Economic pressure employed to "coerce individuals to forgo the exercise of their secured rights" constitutes coercion for purposes of the statute. See *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 647 (2003). Whether a municipality is susceptible to suit under the Act has not been decided definitively. We have held that a municipality is not a

"person" for purposes of the Act. See *Howcroft v. Peabody*, 51 Mass.App.Ct. 573, 591-592 (2001). Earlier cases in the Supreme Judicial Court and in this court, while concluding on the records presented that there was insufficient proof of threats, intimidation, or coercion to justify findings for the plaintiffs, implied that, were the evidence otherwise, liability might lie against the municipality or municipal agency. See *Freeman v. Planning Bd. of W. Boylston*, 419 Mass. 548, 564-566, cert. denied, 516 U.S. 931 (1995); *Murphy v. Duxbury*, 40 Mass.App.Ct. 513, 518-519 (1996). In *Swanset Dev. Corp. v. Taunton*, *supra* at 396, the Supreme Judicial Court left the question open.

We need not attempt to resolve the issue for present purposes. Even assuming that there can be liability on the part of the defendants under the Act, such a finding could not be made on this record. There was no evidence that the defendants indulged in "threats" or "intimidation" with respect to the plaintiff or its proposed activities. Thus, the question is whether there was evidence of "coercion," and we conclude that there was not.

The matter appears to be controlled by *Pheasant Ridge Assocs. Ltd. Partnership v. Burlington*, 399 Mass. 771, 781 (1987), where, in connection with an unlawful taking of the plaintiff's property, the court ruled that the Act did not apply. ***483** "[T]he taking did not itself interfere or attempt to interfere with the plaintiffs' rights by coercion. The taking was an attempted direct, preemptive act and did not seek to coerce any plaintiff to do or not to do anything. Legislation, even unlawful legislation, lacks any quality of coercion when that legislation seeks to eliminate the rights of a person and does not seek to force that person unwillingly to do or not to do something otherwise lawful." *Ibid.* See *Longval v. Commissioner of Correction*, 404 Mass. 325, 333 (1989) ("A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion and

thus does not implicate the Act"). Here, the record lacks sufficient evidence of an "animus against the plaintiff[ ] or [its] project . . . unrelated to [the defendants'] legitimate concerns." See *Murphy v. Duxbury, supra* at 518. There being no liability in this case pursuant to the Act, it follows that there can be no award of expert witness fees thereunder.

We add a final observation on the subject of awards of attorney's fees and costs. The economics of the practice of law are complex. The increasing levels of revenues required to sustain the operations of lawyers and law firms, some unavoidable, some perhaps self-inflicted, directly influence hourly rates and the services performed. If attorneys are able to command those revenues by means of arm's-length contractual arrangements entered into with their own clients, so be it. They cannot, however, expect routinely to receive them in fee awards entered against opposing parties. The case of *Lewis v. National Shawmut Bank*, 303 Mass. 187, 191 (1939), is old, but its words are timely:

> "The power of a court . . . to require payments out of the property of litigants to or for the benefit of counsel who may not have been employed by those whose estates are thus diminished and who may have opposed the latter's interests is a power of great delicacy to be exercised with extreme caution. It is difficult to conceive of anything more likely to undermine public respect for the administration of justice than a wide spread suspicion that the courts are aligned in aiding the distribution among counsel of excessive proportions of the funds of those who are unfortunate enough to become involved in controversy."

***484** As the prevailing party on the substantive issues involved in this appeal, the plaintiff also is

entitled to an award of reasonable appellate attorney's fees and costs. In accordance with the procedure in *Fabre v. Walton*, 441 Mass. at 10-11, the plaintiff may file an application therefor within fourteen days of the rescript of this opinion. The defendants will have fourteen days to respond to the application.

6. *Conclusion.* The judgment that permanently enjoins enforcement of the ordinances at issue against the plaintiff is affirmed. We vacate the order on the plaintiff's petition for attorney's fees and costs and remand for further proceedings consistent with this opinion.

So ordered.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE
John Adams Courthouse
One Pemberton Square, Suite 1200
BOSTON, MASSACHUSETTS 02108-1705
(617) 725-8106

September 8, 2006

Ira H. Zaleznik, Esquire
Lawson & Weitzen
88 Black Falcon Ave., Suite 345
Boston, MA 02210

RE: No. 2005-P-0109

T & D VIDEO, INC.
vs.
CITY OF REVERE & another

NOTICE OF DOCKET ENTRY

Please take note that on September 8, 2006, the following entry was made on the docket of the above-referenced case:

ORDER: ".... plaintiff ... has petitioned for rehearing on a single aspect of ... fee-award section ... We are not persuaded ... it is ...business ... of ... Appeals Court ...to pass upon fee requests pertaining to proceedings in the Supreme Judicial Court. Petition for rehearing denied. (L KN CW, JJ.) Notice/Image (copy given in hand to Neal Quenzer)

Very truly yours,

The Clerk's Office

Dated: September 8, 2006

To: Allen C. B. Horsley, Esquire
Mark A. Walsh, Esquire
Ira H. Zaleznik, Esquire

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

05-P-109

T&D VIDEO, INC.[14]

vs.

CITY OF REVERE & others.[15]

ORDER

The plaintiff, T&D Video, Inc., has petitioned for rehearing on a single aspect of the fee-award section of the decision, see T&D Video, Inc v. Revere, 66 Mass. App. Ct. 461, 478 (2006), wherein we reversed that portion of an attorney's fee award that related to the defendants appeal of the preliminary injunction in the Supreme Judicial Court. The essence of the plaintiff's position appears to be that, because only an interlocutory appeal was involved, the plaintiff had not yet achieved the status of a "prevailing party" for fee application purposes.

We disagree. We believe that the plaintiff prevailed in that case before the Supreme Judicial Court, and its status as the prevailing party in that appeal became fixed when the court returned its decision regardless of what might happen in subsequent proceedings regarding a permanent injunction. Of greater importance is our view that the question is not one of timing, but rather of location. We are not persuaded that it is the business either of

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[14] Doing business as Moonlite Reader.

[15] Zoning board of appeals of Revere and the building inspector of Revere.

the Appeals Court or of a trial court to pass upon fee requests pertaining to proceedings in the Supreme Judicial Court.

Petition for rehearing denied.

By the Court (Laurence, Kantrowitz & Cowin, JJ.),

/s/ Lena M. Wong
Asst. Clerk

Entered: September 8, 2006

APPENDIX E

Supreme Judicial Court for the
Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston,
Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Ira H. Zaleznik, Esquire
Lawson & Weitzen
88 Black Falcon Ave., Suite 345
Boston, MA 02210

RE: Docket No. FAR-15584

T & D VIDEO, INC.
vs.
CITY OF REVERE & others

Suffolk Superior Court No. SUCV1994-06216
A.C. No. 2005-P-0109

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 09/28/06, the above-captioned Application for Further Appellate Review was denied. (Cowin, J., recused)

Susan Mellen, Clerk

Dated: September 28, 2006

To: Allen C. B. Horsley, Esquire
Ira H. Zaleznik, Esquire

APPENDIX F

Supreme Judicial Court for the
Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston,
Massachusetts 02108-1724
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Dated: December 15, 2006

Ira H. Zaleznik, Esquire
Lawson & Weitzen
88 Black Falcon Ave., Suite 345
Boston, MA 02210

RE: No. FAR-15750

T&D VIDEO, INC.
vs.
CITY OF REVERE & others

Suffolk Superior Court No. SUCV1994-06216
A.C. No. 2005-P-0109

NOTICE OF LIMITED ALLOWANCE OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on December 15, 2006, the above-captioned Application for Further Appellate Review was allowed, limited to the issues in the plaintiff's application regarding its request for appellate attorney's fees related to the appeal of the preliminary injunction (T & D Video, Inc. v. Revere, 423 Mass. 577 (1996)). (Cowin, J., recused)

Upon receipt of the case papers from the Appeals Court, notice will be sent to counsel

indicating the new S.J.C. docket number, the number of briefs/appendices transferred, and the Sitting to which the case is assigned for argument before the full bench.

Susan Mellen, Clerk

To: Allen C. B. Horsley, Esquire
Mark A. Walsh, Esquire
Ira H. Zaleznik, Esquire

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

In the case No. FAR-15750

T&D VIDEO, INC.

vs.

CITY OF REVERE & others

O R D E R

It is hereby ORDERED that the above-captioned application for further appellate review be, and hereby is ALLOWED, limited to the issues in the plaintiff's application regarding its request for appellate attorney's fees related to the appeal of the preliminary injunction (T & D Video, Inc. v. Revere, 423 Mass. 577 (1996)). Notice to counsel.

By the Court (Cowin, Jr. recused),

/s/ Susan Mellen
Susan Mellen, Clerk

ENTERED: December 15, 2006

Supreme Court, U.S.
FILED
APR 27 2007
OFFICE OF THE CLERK

(2)

No. 06-887

IN THE

Supreme Court of the United States

CITY OF REVERE, ET AL.,

Petitioners,

v.

T&D VIDEO, INC., D/B/A MOONLITE READER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER DEMAYO
LEBOEUF, LAMB, GREENE
& MACRAE LLP
260 Franklin Street
Boston, Massachusetts 02110
(617) 748-6851

Dated: April 27, 2007

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW

1. Is there any analytic distinction between a court's refusal to award attorney's fees under 42 U.S.C. § 1988 because the fee request is so high as to "shock the conscience" and a refusal to award fees because the request is "outrageously excessive," or "grossly or intolerably inflated," or "manifestly filed in bad faith"? Or is the distinction merely semantic?

2(a). Does a complete ban on adult video stores constitute a time, place, manner restriction?

2(b). May a municipality condition the right to sell non-obscene adult videos on the sale of non-adult videos?

2(c). Is a ban on adult video stores narrowly tailored to curtail the secondary effects of adult entertainment where no other methods of reducing secondary effects have been previously attempted?

2(d). Is a ban on adult video stores justified as a compelling interest in curbing the secondary effects of adult entertainment where the legislative record evidences no investigation or findings of fact regarding secondary effects?

CORPORATE DISCLOSURE STATEMENT

T&D Video, Inc. d/b/a Moonlite Reader is a privately held Massachusetts corporation. Thaddeus Drabkowski and Del Paone are the shareholders.

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MUNICIPAL ZONING ORDINANCES INVOLVED

Revere Zoning Ordinance §§ 17.08.65 through 17.08.069 and § 17.16.045, the provisions at issue in this case, as enacted in 1993, are set forth at Appendix A. These provisions, as amended in 1995, are forth at Appendix B.

STATEMENT OF THE CASE

On September 14, 1993, the principals of T&D Video, Inc., an adult book and video store doing business as "Moonlite Reader" ("T&D"), sought a business certificate from The Revere City Clerk. Petition at 2a. The City Clerk asked one of the principals to sign an "agreement" stating that the business would not rent adult videos, but he refused. *Id.* The City Clerk issued the business certificate anyway. *Id.*

Having learned that T&D intended to open an adult video store, Revere's City Councilors expressed to the Building Inspector, Joseph Ferruzzi, "their concern that there was an adult video store [that was] going to be located in Revere" and asked him "not to allow it." *See* App. at 13a-14a (Ferruzzi confirming that his deposition testimony in this regard is accurate). Ferruzzi told the Councilors that such use was not prohibited by Revere's existing ordinance and that he could not prohibit an adult video store. *Id.* at 15a. In response, the City Councilors stated that "[t]hey would get together with the City Planner and draft one." *Id.* at 16a.

Soon thereafter, Revere's City Planner, Frank Stringi, set about drafting the ordinance. Stringi focused the ordinance on adult content, treating all types of adult entertainment, whether live nude

dancing or video rentals, the same. Stringi testified at trial, "I don't differentiate between a lounge and a video store. They still sell the same material, and that's sexually related." *Id.* at 21a. Stringi further testified that he was unaware at the time that three video stores in Revere already included adult titles in their selection; was unaware that these stores were within 200 feet of residences; and that he had never detected increased crime around these three stores. *Id.* at 17a-18a, 23a-24a. At the time of drafting, Stringi had not "put his hands" on any documentation of his view that adult video stores would have the same deleterious effect on the community as the Squire Lounge, a nude dance entertainment establishment in Revere. *Id.* at 21a-22a. Rather, Stringi was guided by his own personal views, including a belief that people who rent adult videos contribute to prostitution. *Id.* at 23a.

Two days after T&D requested a business certificate, on September 16, 1993, Revere's Mayor submitted to the City Council an "adult entertainment" amendment to Revere's zoning ordinance, which placed numerous restrictions on the location, size, and setbacks of lots containing adult uses. *See* App. E. Former City Councilor Richard Penn testified at the trial that he did not recall the Council considering any documents relating to the secondary effects of adult entertainment in Revere at the time it enacted the ordinance. *See* App. 27a-28a. Nor, Penn testified, did the Council request an investigation of these purported secondary effects. *Id.* at 28a-29a. Penn did not even discuss the ordinance with its drafter, Mr. Stringi, before voting on it. *Id.* at 29a. Similarly, former City Councilor John Arigo testified that his only conversation with Stringi about the law on which the ordinance was based, the Peabody, Massachusetts zoning ordinance, related to the fact that it had been passed. *See id.* at 32a.

On November 8, 1993, the City Council adopted the amendment as §§ 17.08.065 through 17.08.069, and § 17.16.045, of the Revere zoning ordinance (hereinafter, these provisions are referred to as the "Ordinance"). *See* App. A.[1]

In August 1994, having completed its renovations, T&D sought a sign permit for the store. Petition at 4a-5a. Revere's Building Inspector, Mr. Ferruzzi, denied T&D's application, stating that T&D could not operate its store without violating the Ordinance. *Id.* at 5a. After appealing unsuccessfully to Revere's zoning board of appeals, *id.*, T&D promptly filed suit and moved for a preliminary injunction enjoining enforcement of the Ordinance. T&D brought claims under the First Amendment and Article 16 of the Massachusetts Declaration of Rights. *Id.* at 29a-30a.[2]

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[1] In its Petition, Revere neglects to include the Ordinance in the appendix, despite the fact that its Petition is based in part on the alleged constitutionality of the Ordinance. This omission is in violation of the Court's rules. *See* Sup. Ct. Rule 14.1(f) (requiring inclusion of the "ordinances . . . involved in the case" in the text of the Petition, or if the ordinance is lengthy, in excerpt form in the appendix).

[2] While the Massachusetts Appeals Court (the "Appeals Court") rested the decision below on the First Amendment, the Massachusetts Supreme Judicial Court has indicated that the protections afforded speech by Article 16 are broader than those afforded by the First Amendment. *See Commonwealth v. Sees*, 374 Mass. 532, 536-37 (1978) (holding that Article 16 protected nude dancing that might have been proscribed under the First Amendment); *see also Opinion of the Justices to the House of Representatives*, 349 Mass. 786, 792-793 (1965) (opining on legality of proposed law under Article 16, but not the First Amendment, apparently because law could be invalid under former but constitutional under latter).

After extensive briefing and a hearing, the trial court preliminarily enjoined enforcement of the Ordinance, noting the high likelihood that it imposed an unconstitutional restraint on speech. *T&D Video, Inc. v. City of Revere*, 3 Mass. L. Rptr. 427 (1994). The Massachusetts Supreme Judicial Court affirmed entry of the preliminary injunction in *T&D Video, Inc. v. City of Revere*, 423 Mass. 577 (1996).

Revere, meanwhile, had apparently realized that the interplay of setback and lot size restrictions in the Ordinance made it geometrically impossible to open an adult use *anywhere* in Revere. Petition at 4a. On May 1, 1995, Revere amended the Ordinance to reduce the setback requirements and expand the range of allowable lot sizes. *See* App. B.

Following affirmance of the preliminary injunction, extensive discovery ensued from 1996 to 1999, including T&D's deposing members of the Revere City Council. After T&D's motion for summary judgment was denied, a bench trial was held in August 2002. Two experts on land use testified on T&D's behalf that the Ordinance foreclosed virtually all locations for an adult video store to operate in Revere. Petition at 7a. Revere's city planner, Mr. Stringi, testified to dispute this testimony. *See, e.g.*, App. D. The trial court issued its ruling on October 23, 2002, holding that the Ordinance violated the First Amendment because it left inadequate alternative avenues of communication. Petition at 6a-10a. Specifically, the trial court credited T&D's experts' testimony that the Ordinance limited adult uses to a single location in Revere: a contaminated oil tank farm that was patently unsuitable for operation of a retail store. *Id.* at 7a. Defendants were permanently enjoined from enforcing the Ordinance. *Id.* at 10a.

Additionally — in language that Revere inexplicably redacted from the copy of the decision reproduced in the appendix to its Petition — the trial court held that Revere had "directed the Ordinance specifically at T&D." *See* App. H for an unredacted copy of ¶ 3 of the trial court's Conclusions of Law.[3]

T&D filed a petition for attorney's fees and costs on January 16, 2003. After briefing and a hearing at which two expert witnesses testified on behalf of T&D and were cross-examined, on February 9, 2004 the trial court ruled that T&D was entitled to $915,027 in reasonable attorney's fees, expert fees, and costs. *See* Petition at 12a-25a. In his decision, the trial judge found it "patently obvious" that

> Revere was never interested in resolving this case through settlement or alternative dispute resolution, and that this attitude, politically engendered, obtained long after it was apparent that its actions in framing and attempting to enforce unconstitutional zoning regulations enacted for the sole purpose of 'zoning out' T&D Videos [*sic*] proposed use of its premises as an adult entertainment video and bookstore, were patently illegal.

Id. at 22a-23a.

Revere appealed, but the Appeals Court affirmed the holding that the Ordinance was unconstitutional and entry of the permanent

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[3] This Court's Rule 14.1(h) does not permit a party to submit *excerpts* of the relevant opinions below. The Court can hardly determine whether a particular decision merits a writ of certiorari when portions of that decision have been selectively excised.

injunction. *See id.* at 26a-53a. The Appeals Court held that there was ample evidence to support the trial court's finding that the Ordinance left only one, unsuitable location for an adult use to locate in Revere, and that this was inadequate under the Court's "time, place, manner" jurisprudence. *Id.* at 38a-40a.

With respect to the fee award, the Appeals Court rejected Revere's argument that T&D's initial request for attorney's fees was so high that T&D, as a penalty, should receive no fees. Analyzing the issue, the Appeals Court held that

> [a] judge may deny in its entirety a request for an award of fees only if the amount that the prevailing party requests is so 'unreasonable' and exorbitant that it 'shocks the conscience,' or if counsel makes no good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.

Id. at 42a. As authority for this proposition, the Appeals Court cited decisions from the First, Fourth, Fifth, and Seventh Circuit Courts of Appeals. *Id.* While the court found that T&D's fee request did not meet this standard, it did find that the $915,027 in fees awarded was too high and remanded this issue to the trial court. *Id.* at 43a-53a.

Revere subsequently applied to the Massachusetts Supreme Judicial Court for further appellate review, but that court denied Revere's application by order dated September 28, 2006. *Id.* at 58a.

REASONS FOR DENYING THE WRIT

The Petition raises no substantial issues. In the proceedings below, Revere failed to raise its argument regarding the purported "circuit split" as to the standard for denying fees requested under § 1988. The issue is chimerical, in any event. All of the courts that Revere mentions in its Petition exercise their discretion to deny fees when they consider the fee request grossly excessive. The fact that they use synonymous, but not identical, phrases to describe this excessiveness is of no significance. Indeed, the cases Revere describes as on opposite sides of a "circuit split" cite to one another as authority. Revere's argument is frivolous.

Revere's First Amendment arguments are, if anything, even less compelling. This Court has never suggested that a complete ban on adult video stores is permissible under its time, place, manner jurisprudence. Revere's content-based ban, though masquerading as a zoning law, must be reviewed under the strict scrutiny standard. Strict scrutiny is also required because the Ordinance is effectively a means of compelling speech (the sale of non-adult videos). The Ordinance fails the strict scrutiny standard on several grounds. The Ordinance was unjustified because the legislative record is devoid of any indication that Revere considered the secondary effects of adult entertainment. A complete ban could not be narrowly tailored to any governmental interest because less drastic methods of regulating secondary effects were available but never even attempted. Finally, the trial court's undisputed finding that Revere passed its Ordinance to single out T&D must doom the law.

I. THERE IS NO CIRCUIT SPLIT REGARDING THE STANDARD FOR DENYING A FEE REQUEST MADE UNDER 42 U.S.C. § 1988

Revere's claim that a "circuit split" exists between courts that have used the phrase "shocks the conscience" in assessing whether to deny an attorney's fee request made under § 1988, and courts that have used other language, is without merit. It is a transparent attempt to create a disputed legal issue where none exists. Perhaps the best evidence that Revere has manufactured the argument for this Petition is the fact that it failed to raise it in the proceedings below.

Revere was entirely silent on this issue in the Appeals Court, even though the trial court cited to the "shocks the conscience" standard in its fee award. *See* Petition at 17a. In its brief to the Appeals Court, Revere simply argued that the trial court had reached the wrong result, not that it had applied the wrong standard. *See* App. I. Similarly, in its application to the Massachusetts Supreme Judicial Court for further appellate review, Revere never took issue with the "shocks the conscience" standard employed by the Appeals Court. *See* App. J. To the contrary, Revere embraced that standard, lamenting that "the conscience of the Appeals Court needs sharpening." App. at 45a. Both Revere's Appeals Court brief and its application for further appellate review cite *Fair Hous. Council of Greater Wash. v. Landow*, 999 F.2d 92 (1993), a Fourth Circuit case that Revere thought good law as of last fall but now claims was erroneously decided. While Revere argues in its Petition that the Appeals Court and the Fourth Circuit are aligned on the wrong side of a "circuit split," in the courts below it argued that the trial court and Appeals Court had disregarded the teachings of *Landow*, a case that it cited among the decisions of the other circuits. *See*

App. at 41a; ("Notwithstanding the admonition of the First, Fourth, Fifth and Seventh Circuits, T&D, in this case, submitted a grossly bloated, outrageously excessive request for fees and costs."); App. at 48a (same).

It is little wonder that Revere disregarded this Court's Rule 14.1(g)(i) and failed to set forth in the Petition the manner in which it preserved this federal question in the proceedings below. Not only did Revere fail to raise the question, it took a position in those proceedings completely opposite of the one it has adopted for this Petition.

Even had Revere not waived its right to raise the issue of whether the "shocks the conscience" standard is correct, its argument is utterly unpersuasive and raises no serious issues requiring the Court's consideration. Revere now argues that the "shocks the conscience" language employed by the Appeals Court and the Fourth Circuit is "too onerous, does not conform with the spirit of prior decisions of this Court, and conflicts with decisions of other federal courts of appeal considering the issue." Petition at 8. Specifically, Revere claims that the "shocks the conscience" standard used by the Appeals Court below and by the Fourth Circuit in *Landow*, is more stringent than, and in "conflict" with, the standards set forth in *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980), and *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991). *Id.* at 9-10.

The argument is baseless. To simply read the decisions of the Appeals Court and the Fourth Circuit is to see through Revere's argument. In the decision below, the Appeals Court not only considered *Landow* in assessing T&D's attorney's fee request, but also considered *and cited to Stackler* and *Kendrick*. *See* Petition at 43a (citing *Stackler*, 612 F.2d at 1059;

Kendrick, 944 F.2d at 958; *Landow*, 999 F.2d at 96; *Scham v. District Cts. Trying Criminal Cases*, 148 F.3d 554, 558 (5th Cir. 1998)). The Appeals Court clearly understood that the foregoing authorities all set forth the same general standard for denial of fees under § 1988.

Similarly, in *Landow*, the Fourth Circuit held that district courts could deny attorney's fees outright when the request was "so excessive it shocks the conscience of the court." *Id.* at 97. As authority for this proposition the *Landow* court cited *Stackler* and *Kendrick* with approval and wrote, "we *join* the First and Seventh Circuits in recognizing discretion in the district courts to deny a fee request in its entirety in civil rights litigation when the amount requested is so excessive it shocks the conscience of the court." *Landow*, 999 F.2d at 97 (emphasis added).

If there is a circuit split here, it is a peculiar one where all of the involved circuits believe themselves to be in harmony.

All of the other decisions that Revere suggests are also in "conflict" with the Appeals Court and the Fourth Circuit reveal no such conflict. Rather, they reveal the unremarkable fact that different courts sometimes use different words when describing what constitutes an exorbitant fee request. In its Petition, Revere cites four different phrases that circuit courts have employed in the course of considering § 1988 fee requests: the Seventh Circuit may deny "intolerably inflated" fee applications; the D.C. Circuit may deny fee applications that are "manifestly inadequate, 'grossly and intolerably exaggerated, or manifestly filed in bad faith'"; alternatively, the D.C. circuit may deny fee applications that are "outrageously unreasonable"; and the Tenth Circuit may deny a fee application that is "outrageously excessive." *See*

Petition at 9-10 (citations omitted). For reasons which are left unstated, Revere concludes that the varying phrases used by these different circuits are consistent with one another, and with *Kendrick*, but inconsistent with the language employed by the Fourth Circuit and the Appeals Court. *Id.*

It is clear, however, that while each circuit has articulated the standard differently, these semantic differences do not alter the meaning of the standard. The decisions indicate that, in spite of the courts' different phrasing, their standards are all designed to test the same thing: whether an award would encourage plaintiffs' attorneys to make unreasonable demands. In *Stackler*, the Seventh Circuit explained that an outright denial of fees is appropriate when the denial will prevent attorneys from making unreasonable demands without consequences:

> If, as appellant argues, the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place. To discourage such greed a severer reaction is needful, and the District Court responded appropriately in the case at bar.

612 F.2d at 1059.

Other courts of appeal subsequently followed the Seventh Circuit's lead and denied attorney's fees applications outright where an award of attorney's fees would have encouraged unreasonable fee

applications. *See Envtl. Def. Fund v. Reilly*, 1 F.3d 1254, 1258 (D.C. Cir. 1993) (citing *Stackler* with approval and holding that it can deny an outrageously unreasonable fee request in its entirety to prevent plaintiff's attorneys from feeling free to make unreasonable demands); *see also Kendrick*, 944 F.2d at 958 (citing *Stackler* with approval and declaring that an outright denial of fees "is strong medicine, but for this blow-up of a routine [civil rights matter], and inexcusable reaching for fees — to the burden of the court — we believe it entirely appropriate."); *Landow*, 999 F.2d at 97 (citing *Stackler* with approval and "telegraph[ing] a signal to attorneys . . . to act responsibly when submitting petitions for attorneys' fees.").

Contrary to Revere's suggestion, the Fourth Circuit's "shocks the conscience" standard does indeed follow the spirit of this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." (citation omitted). As several circuits have noted, in consideration of *Hensley* and the Congressional intent behind § 1988, an outright denial of fees is a severe sanction that is reserved only for fee requests that clearly abuse the judicial process. *See Zabkowicz v. W. Bend Co.*, 789 F.2d 540, 550 (7th Cir. 1986) (considering *Hensley's* holding that Title VII Plaintiffs should be awarded attorney's fees absent special circumstances and recognizing that wholesale denial of attorney's fees requests "is a stringent sanction, to be reserved for only the most severe of situations, and appropriately invoked only in very limited circumstances.") (citations and internal quotation marks omitted); *Budget Rent-A-Car Sys., Inc. v. Consol. Equity, LLC*, 428 F.3d 717, 718 (7th Cir. 2005) ("[D]enial is an appropriate sanction for requesting an award that is not merely

excessive, but so exorbitant as to constitute an abuse of the process of the court asked to make the award."); *see also Jordan v. United States Dep't of Justice*, 691 F.2d 514, 518 (D.C. Cir. 1982)(describing a total denial of a fee request as a "purely prophylactic measure").[4] The Fourth Circuit's "shocks the conscience" standard is certainly in the spirit of the Congressional intent and the case law interpreting § 1988.

Finally, even assuming there was a conflict between the circuits' standards, review of the Appeals Court's decision would not be an appropriate exercise of this Court's powers. Under any circuit's standard, an outright denial of attorney's fees is a matter of discretion. *See Budget Rent-A-Car*, 428 F.3d at 718 (recognizing that under *Stackler*, the District Court *may* order an outright denial of attorney's fees, whereas if sanctions are sought under Fed. R. Civ. P. 11, the District Court *shall* order outright denial of attorney's fees in certain circumstances); *Landow*, 999 F.2d at 96 ("A district court *may, in its discretion*, deny a request for attorneys' fees in its entirety when the request, submitted pursuant to 42 U.S.C. § 1988, is so outrageously excessive it 'shock[s] the conscience of the court.'") (emphasis added); *Reilly*, 1 F.3d at 1258 (recognizing discretion to deny fees); *Stackler*, 612 F.2d at 1059 (exercising discretion to deny fees).

Revere cannot point to any abuse of discretion committed by the Appeals Court, let alone an abuse of discretion sufficient for this Court to overturn the Appeals Court's decision. That is not surprising,

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[4] Even the less-restrictive penalty of a significant general reduction in hours only occurs in a "rare case." *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1251 (10th Cir. 1998) (finding that a general significant reduction in hours was not appropriate where case concerned novel legal issues and was vigorously litigated).

considering that several circuit courts have, in their exercise of discretion, refused to deny attorney's fees even where they found the fee request excessive. For example, in *Jordan* the D.C. Circuit held that, absent an outrageous or unprecedented fee request, if the plaintiff's application "was by the District Court's assessment somewhat excessive, the proper response was a reduction of the rate by the court before calculation of the lodestar." 691 F.2d at 521; *see also Reilly*, 1 F.3d at 1258 ("In a case of less egregious overbilling, we may impose a lesser sanction, such as awarding a fee below what a 'reasonable' fee would have been in order to discourage fee petitioners from submitting an excessive request"); *Mills v. Eltra Corp.*, 663 F.2d 760, 762 (7th Cir. 1981) (refusing to deny fee request "in toto" even though claim was "enormous and out of line" where attorney's "work was of substantial value."); *DiFilippo v. Morizio*, 759 F.2d 231, 236 (2d Cir. 1985) (ordering reduction in fee award where fee request was "grossly" and "facially" excessive).

II. REVERE'S TOTAL BAN ON ADULT VIDEO STORES VIOLATES THE FIRST AMENDMENT

Having argued doggedly (and unsuccessfully) for nearly 12 years that its Ordinance provides ample locations in Revere to open an adult video store, Revere – now hoping to pique this Court's interest – has dispensed with its unsubstantiated factual claims and retooled its argument as a legal one. No longer does Revere assert that its Ordinance permits adult video stores to open within its city limits. It is indeed a ban, Revere now argues, but it is a constitutional one because a municipality may totally ban all adult videos stores so long as the same or similar videos are available at other stores in Revere (stores exempt from

the Ordinance because their inventory consists only partly of adult materials).

As Revere would have it, there was no need for it to have amended its Ordinance in 1995 so that compliance became geometrically possible. Indeed, there was no need to have drafted any restrictions on setbacks, lot sizes, or the locations of properties containing adult uses; that was apparently all just window dressing to make the law look like a zoning ordinance, but purely optional window dressing on Revere's part. Instead, Revere suggests, it was free to have simply enacted a one-sentence provision banning all video stores whose inventory contains over 20% adult materials. Further, Revere claims that it would have been justified in doing so under this Court's time, place, manner jurisprudence. The argument fails for multiple reasons.

A. A Ban is Not a Time, Place, Manner Restriction

Revere's suggestion that a complete ban on adult video stores is a time, place, manner restriction cannot be taken seriously. A time, place, manner restriction is, by definition, *not* a ban. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 443 (2002) ("[A]n ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation *and not a ban.*") (emphasis added). Revere does not cite a single case of this Court — or *any* court — that even remotely suggests that a municipality may constitutionally ban all adult video stores from its borders. The proposition runs counter to over 30 years of this Court's decisions on the zoning of adult uses. This Court has consistently held that municipalities must provide adequate fora for establishments that provide non-obscene adult live entertainment, show adult

movies, or sell or rent adult videos and books. *See, e.g., Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 62 (1976) ("There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained."); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1981) ("To be reasonable, time, place, and manner restrictions not only must serve significant state interest but also must leave open adequate alternative channels of communication . . . Here, the Borough totally excludes all live entertainment, including nonobscene nude dancing that is otherwise protected by the First Amendment.") (citations omitted); *see also Alameda Books*, 535 U.S. at 443.

The case on which Revere purports to rest its argument, *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), in fact refutes its claim that a ban on adult video stores is permissible. In *Renton*, the ordinance in question left over five percent of the municipality's land, some 520 acres, available for adult theaters. *Id.* at 53. The district court found this acreage to consist of "ample, accessible real estate." *Id.* This Court upheld the ordinance in *Renton* specifically because it provided ample locations for adult theaters to operate:

> In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Id. at 54.

Revere's Ordinance, falling outside the ambit of this Court's time, place, manner jurisprudence, must be reviewed under the demanding strict scrutiny standard applicable to content-based regulations. Compare *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (strict scrutiny required for content-based restrictions on speech) with *Alameda Books*, 535 U.S. at 440 (lower, intermediate scrutiny standard applicable for content-neutral time, place manner restrictions). Under the strict scrutiny standard, the Ordinance must be narrowly tailored to serve a compelling government interest. *See Playboy*, 529 U.S. at 813.

B. The Ordinance Unconstitutionally Conditions the Exercise of First Amendment Rights on Compelled Speech

In hopes of finessing the strict scrutiny standard Revere argues that, notwithstanding its total ban on adult video stores, other stores in Revere sell the same videos as T&D, therefore "there is no suppression of speech" under the Ordinance. Petition at 13. If there is no suppression of speech, Revere suggests, then presumably the Ordinance passes constitutional muster under any conceivable standard of review.

This argument is a *non sequitur*. It assumes that the rights of listeners — here, adult video viewers — are the only rights at stake. It may be true that those patrons can go elsewhere in the city to rent adult videos, as Revere argues, or it may not be true. Regardless, to focus on the listener exclusively is to conduct only half of the analysis. The rights of speakers — here, parties like T&D who wish to sell

adult videos — are at stake as well as the rights of listeners.

It is clear under the case law that vendors such as T&D have a constitutional right to offer communicative works created by others for distribution and consumption. Indeed, all of the foregoing cases deal with the First Amendment rights of the speaker-vendor: the party operating the adult movie theater, not the moviemakers, *see Young*, 427 U.S. 50; *Renton*, 475 U.S. 41; the owner of the bar offering nude dancing, not the dancers, *see Schad*, 452 U.S. 61; the proprietor of the adult bookstore, not the authors. *See Alameda Books*, 535 U.S. 425. The Petition simply glosses over a vast body of First Amendment law on the rights of speakers. *See also Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . ..")

Taken to its logical extreme, Revere's argument would permit a ban on the sale of any adult videos within its city limits, so long as the adult movies in question were available through some channel other than retail stores. Revere insinuates as much when it claims that the movies T&D sells are available "from other sources, including the internet." Petition at 12. (The Court is left to surmise that everyone in Revere has internet access.)

What Revere is really arguing in its Petition, though backhandedly, is that it is permissible for a municipality to condition a store's sale of adult videos on its sale of non-adult videos. Revere attempted to impose such a condition on the sale of adult videos through its Ordinance. The Ordinance requires, in effect, that for every sexually themed video that a store

offers, the store must stock over four *non*-sexually themed videos (*i.e.*, for each adult title, over four copies of King Kong or North by Northwest or Titanic or some other non-adult fare). That is the only way a store's inventory would contain less than 20% adult materials and would escape the designation of a banned "adult video store." *See* App. B.

As authority for this novel proposition, Revere cites a First Circuit case holding that a historic district may lawfully ban newspaper vending machines where other sources of distribution exist, *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175 (1st Cir. 1996). That case might provide some precedent for Revere's ban *if* newspaper vending machines possessed First Amendment rights. In *Globe Newspaper*, the only speech rights at stake were those of the newspaper, the party that created the speech. *Id.* at 182. Here, by contrast, the vendor of the speech in question, T&D, possesses rights independent of the rights of the producers, directors, and actors who created the speech. T&D's constitutional rights are impinged when it is barred from distributing this speech to the public. The same obviously cannot be said of a vending machine. Had the law in *Globe Newspaper* banned individuals from selling newspapers, then the case might have offered some support for Revere's Petition; but the law did no such thing.

Certainly, *Globe Newspaper* has no bearing on Revere's suggestion that the government may condition the exercise of one's constitutional right (the sale of adult videos) on compelled communication (the sale of non-adult videos). Had the law in question required the press to distribute other communications in their vending machines, along with their newspapers, then *Globe Newspaper* would have offered some precedent for Revere; but, again, the law

did no such thing, and if it had, the First Circuit would have struck it down under this Court's precedents on compelled speech.

Those precedents are, remarkably, nowhere to be found in the Petition. No doubt Revere failed to mention this Court's extensive case law on compelled speech because these decisions completely foreclose the argument that Revere advances here. It has long been clear that the First Amendment places a general proscription on government-compelled speech. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-642 (1943). A corollary of this principle is that the government may not condition the exercise of one's rights on one's uttering compelled speech. In *Wooley v. Maynard*, 430 U.S. 705 (1977), for instance, this Court held that the state could not constitutionally require those wishing to drive a car to display a license plate espousing the state's ideology. *See id.* at 715 (finding repugnant that "driving an automobile, a virtual necessity for most Americans," was conditioned on "displaying 'Live Free or Die' to hundreds of people each day").

If the "right" to drive a car cannot be conditioned on one's uttering compelled speech, then necessarily the exercise of one's *constitutional* right to speak cannot be so limited. Numerous cases of this Court so hold. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (law compelling newspapers to publish replies to editorials violates the First Amendment); *Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781 (1988) (law requiring professional fund raisers to disclose portion of collections turned over to charity during previous year violates the First Amendment); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (public accommodation law violates First Amendment to the extent it requires parade's organizers to include

marchers expressing ideological views that organizers disagree with); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (anti-discrimination law violates the First Amendment right to associate to the extent it compels organization's inclusion of person whose ideological point-of-view is contrary to organization's).

Here, as noted above, even though T&D did not create the movies it sells, its role as a vendor of these materials is a form of speech protected under the First Amendment. T&D's selection of which videos to carry is an expressive activity, analogous to a public television station's or cable programmer's selection of which programs to carry. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.") (citation omitted); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek to communicate messages . . ..") (citation and internal quotation marks omitted). The First Amendment does not "require a speaker to generate, as an original matter, each item featured in the communication." *Hurley*, 515 U.S. at 570.

Thus, just as the government could not lawfully compel the speakers in the foregoing cases to include an item of speech in their selections and compilations, Revere may not compel T&D to dilute its adult video offerings by acquiring and purveying over four times as many non-adult videos. Indeed Revere could not lawfully compel T&D to stock even a single copy of a non-adult video. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) ("There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification.").

C. The "Barren" Legislative Record in this Case Precludes Revere From Proving a Compelling Interest in Curbing the Secondary Effects of Adult Entertainment

Revere cannot establish that it had a compelling interest in controlling the secondary effects of adult entertainment in Revere because the Ordinance's legislative record contains virtually no data or research bearing on this topic.

The relevant facts regarding the enactment of the Ordinance have been recounted in the Statement of the Case, *supra*, and excerpts of key testimony are set out in the appendices to this Opposition. Suffice it to say, two days after the City Council learned that T&D planned to open a bookstore, the Mayor presented to the Council a draft Ordinance which was largely a copy of ordinances enacted by other towns (but with the setback requirements arbitrarily increased). The evidence indicates that the Ordinance was informed only by the Revere City Planner's intuitions and prejudices. *See* App. D. The record contains no fact-finding by Revere regarding the secondary effects stemming from its existing adult uses (*e.g.*, the Squire Lounge or the three video stores that sold adult videos at the time T&D opened its store). It is conceded that the City Council did not attempt to obtain the investigations of the other cities, on whose laws the Ordinance was patterned. *See* App. at 28a-29a. Indeed, the City Council apparently enacted the law with absolutely no information on the subject of adult uses and secondary effects.

For these reasons, the Massachusetts Supreme Judicial Court agreed with the trial court that "[t]he legislative record is barren" in this case. *T&D*, 423 Mass. at 581.

Clearly, the secondary effects of adult entertainment can create significant problems for towns and cities, which towns and cities are entitled to regulate with *reasonable*, content-neutral, time, place, manner restrictions. *See Alameda Books*, 535 U.S. at 444-45 (Kennedy, J., concurring). It does not follow from this observation that municipalities are free to enact laws restricting speech, with virtually no investigation of the ills that the laws are supposed to cure, simply by invoking secondary effects. The legislative record here falls far short even of the standards this Court has set for municipalities passing content-neutral zoning laws. While one municipality may rely on another's data and research when enacting an adult use zoning ordinance, *see Renton*, 475 U.S. at 51-52, this Court has never suggested that one municipality may simply enact the text of another's ordinance without considering the research and data that gave rise to the law; without considering whether secondary effects in fact require remediation; and with no effort to limit the abridgement of protected speech. *See id.* at 51 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*") (emphasis added); *Alameda Books*, 535 U.S. at 438 ("This is not to say that a municipality can get away with shoddy data or reasoning. *The municipality's evidence must fairly support the municipality's rationale for its ordinance.*") (emphasis added). The "barren" record in this case fails this Court's standards, as set forth in *Renton* and *Alameda Books*, for justifying content-neutral, time, place, manner restrictions.

Having failed to meet even the comparatively low standard for justifying a content-neutral restriction on speech, Revere necessarily failed to establish a compelling interest in combating the secondary effects of adult uses. Perhaps this was not an insurmountable bar for Revere to meet; but its slapdash legislative efforts fell far short.

D. A Ban on Adult Video Stores is Not Narrowly Tailored to Reduce the Secondary Effects of Adult Entertainment

Revere fails the other prong of the strict scrutiny standard as well. Revere cannot seriously argue that a *ban* on adult video stores is narrowly tailored to controlling the secondary effects of such stores. The cases Revere cites suggest nothing of the sort.

This Court has previously upheld a variety of content-neutral restrictions that municipalities may impose upon adult uses in an effort to curb the secondary effects of such uses. These include restricting the use to certain zoning districts, as well as imposing minimum distance requirements relative to residential areas, schools, churches, and other adult uses. *See, e.g., Young*, 427 U.S. 50; *Renton*, 475 U.S. 41; *Alameda Books*, 535 U.S. 425. Clearly Revere was aware of these restrictions, as well as others, such as those setting parameters for the size of the lot in question; those requiring setbacks from the street and other properties; or those restricting signage outside the adult use. *See* Appendices A and B.

Yet Revere has never availed itself of *any* of these methods. While it is true that Revere's Ordinance was styled as a zoning law, it was in fact a

ban, as Revere now concedes. Having never made any attempt to pass lawful, content-neutral zoning restrictions on adult uses, nor any attempt to research the secondary effects of adult uses within the city, Revere can hardly argue that only a ban on adult video stores will suffice to curtail their secondary effects. As noted in Part II(C) above, the legislative record in this case would not even support a content-neutral time, place, manner restriction on space, let alone a ban on adult video stores.

Assuming *arguendo* that a ban such as the one here could ever be constitutional, a city council would have to engage in an extensive fact-finding process in order to prove that the ban was narrowly tailored. The city would have to investigate, among other things: whether less restrictive approaches were available, such as zoning laws; whether support existed for the assertion that stores selling non-adult videos along with adult videos experience diminished secondary effects; whether support existed for setting a 20% inventory of adult videos as the threshold at which the store must be banned; whether the requirement that a store sell 80% non-adult videos would raise the barrier to entry for new stores planning to sell adult videos and thereby suppress speech; and whether stores selling non-adult videos along with adult videos would increase the likelihood of minors gaining access to adult videos.

Needless to say, one will not find the answer to any of these questions in the Ordinance's legislative record, which, as noted above, is virtually devoid of information. Nor would one expect to find such information in the record since, as noted, at the time it passed the Ordinance in 1993, and throughout much of this litigation, Revere was emphatic that its law was *not* a ban. *See* App. at 22a. (Revere's City Planner testifying that Ordinance was intended to

"still allow[] adult uses to exist within the community."); App. E (Mayor of Revere opining to City Council that "communities cannot totally prohibit adult uses . . .."). The legislative record could hardly be expected to establish the need for a total ban when the law's drafters have all along urged that it was not a ban and that bans are, in fact, illegal.

Revere's suggestion that its ban on adult video stores was narrowly tailored is absurd. Thousands of municipalities across the country use content-neutral zoning restrictions to control the secondary effects of adult entertainment. Revere cannot seriously argue that its ban on adult video stores is narrowly tailored to achieve these same ends — particularly where it has never even attempted to zone adult uses as other cities and towns do. It is hardly surprising that the Appeals Court disposed of Revere's argument in a footnote. *See* Petition at 39a n.8.

E. The Ordinance is Unconstitutional Because it was Enacted Specifically to Prevent T&D from Opening an Adult Video Store

Finally, the Court should deny Revere's Petition because it is clear that Revere passed the Ordinance to prevent T&D from opening an adult video store. The complete lack of fact-finding by Revere confirms that the Ordinance was not designed as a general measure to prevent the secondary effects of adult entertainment, but rather as a means of zoning T&D out of Revere. The trial court so found. *See* App. H; *see also* Petition at 22a (holding that Revere's "unconstitutional zoning regulations [were] enacted for the sole purpose of 'zoning out' T&D Videos [*sic*] proposed use of its premises as an adult entertainment video and bookstore").

The Appeals Court did not disturb the trial court's findings, though it held that "unspoken legislative motivations" were irrelevant to its constitutional analysis. Petition at 37a. In this regard, the Appeals Court certainly erred. It is well-settled that a regulation "is sufficiently justified *if* . . . the governmental interest is unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (emphasis added); *see Playboy*, 529 U.S. at 812 ("One sponsor of the measure even identified appellee by name . . . Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles."); *see also Renton*, 475 U.S. at 54 (upholding ordinance where municipality had not "used the power to zone as a pretext for suppressing expression") (citation and internal quotation marks omitted).

The trial court's undisturbed rulings are now beyond review, and provide yet another basis for this Court to deny the Petition. If a single Congresswoman's statement that a law will cover a particular speaker evidences that law's illicit purpose, *see Playboy*, 529 U.S. at 812, then certainly the trial court's rulings are conclusive evidence that the Ordinance unconstitutionally singled out T&D.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHRISTOPHER DEMAYO
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Dated: April 27, 2007

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APPENDIX A

AN ORDINANCE FURTHER AMENDING THE ZONING ORDINANCE OF THE CITY OF REVERE

SECTION 1

That Title 17, Chapter 17.16, Section 17.16.040 of the Revised Ordinance of the City of Revere be amended by adding the following to the Use Regulation Table under Business Uses:

ADULT ENTERTAINMENT ESTABLISHMENTS, ADULT BOOKSTORE, ADULT VIDEOSTORE, ADULT MOTION PICTURE THEATRE & ADVERTISEMENT SIGNS

RA	RB	RB1	RC	RCI	RC2	RD	NB	GB	CB	HB	I	PDD-1
NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	SP	NO

SECTION 2

That Title 17, Chapter 17.16 of the Revised Ordinance of the City of Revere be amended by inserting the following new section:

Section 17.16.045 Adult Entertainment Establishments Adult Bookstore, Adult Videostore, Adult Motion Picture Theatre & Advertisement Signs or Devices within the I District. Adult entertainment establishments, adult bookstore, adult videostore, adult motion picture theatre and advertising signs or devices erected, constructed, placed, altered, converted or otherwise changed may be allowed by special permit in the I District in conformance with the following minimum criteria:

A. Adult Entertainment Establishments, adult bookstore, adult videostore, adult motion picture theatre and advertising signs or devices may not be located less than 1000 (one thousand) feet from the

nearest lot line of: each other; public or private nursery schools; public or private day care centers; public or private kindergartens; public or private elementary schools; public or private secondary schools; playgrounds; parks; conservation areas; churches; residential uses; and residential districts.

B. A 30 ft. wide landscaped strip shall be provided along the property line fronting a public or private way.

C. Adult Entertainment Establishments, Adult Bookstores, Adult Videostores, Adult Motion Picture Theatres and advertising signs or devices are to be limited to lots greater than 25,000 square feet but not more than 40,000 square feet.

D. Adult Entertainment Establishments, Adult Bookstores, Adult Videostores, Adult Motion Picture Theatres and advertising signs or devices may not be allowed within a multi-use building or building containing other retail or consumer uses.

E. All advertising signs and adult entertainment uses, adult bookstores, adult videostores, and adult motion picture theatres shall not be located within 100 ft. of a public or private way and must be set back a minimum of 100 ft. from all property lines.

F. No adult use advertising sign shall contain any moving, flashing or animated lights, or visible moving or movable parts.

SECTION 3

Title 17, Chapter 17.08 of the Revised Ordinances of the City of Revere is hereby amended by inserting the following new section:

Section 17.08.065 Adult Entertainment Establishment. "Adult Entertainment Establishment" means any establishment which displays entertainment which is distinguished or characterized by its emphasis depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.

Section 17.08.066 Adult Bookstore. "Adult Bookstore" means an establishment having as a substantial or significant portion of its stock in trade, rental or sale, books, magazines, and other matter which are distinguished or characterized by their emphasis, depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.

Section 17.08.067 Adult Videostore. "Adult Videostore" means an establishment having as a substantial or significant portion of its stock in trade, rental or sale, videos and other matter which are distinguished or characterized by their emphasis depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of two hundred and seventy-two.

Section 17.08.068 Adult Motion Picture Theatre. "Adult Motion Picture Theatre" means a building used for presenting materiel distinguished by an emphasis on matter depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.

Section 17.08.069 Adult Use Advertisement Sign. "Adult Use Advertisement Sign" means an advertising sign or device which advertises an adult entertainment use, adult bookstore, adult videostore or adult motion picture theatre and/or advertises the trade, rental or sale of material distinguished by an emphasis on matter depicting depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of chapter two hundred and seventy-two.

APPENDIX B

City of Revere
City Council

Date: May 1, 1995

City Council Order No. CZ-95-2/95-222

Offered By Councillor Colarossi

PLAINTIFF'S
EXHIBIT
6
1-9-97

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF REVERE AS FOLLOWS:

Section 1. Title 17, Chapter 17.08 of the Revised Ordinances of the City of Revere is hereby amended by deleting Sections 17.08.065, 17.08.066, 17.08.067, 17.08.068 and 17.08.069, and in place thereof, the following new Sections are inserted:

17.08.065(A) Adult bookstore. "Adult bookstore" means an establishment having substantial or significant portion of its stock in trade, rental or sale, books, magazines and other matter which are distinguished or characterized by their emphasis, depicting, describing or relating to sexual conduct or sexual excitement as defined in Section thirty-one of Chapter two hundred seventy-two, M.G.L., and which shall be deemed to include so-called sexual aids, mechanical and non-mechanical stimulators and objects fashioned to resemble or perform certain of the functions of the human sexual organs and genitalia. (C.O. 93-504 sec.3 (part))

17.08.065(B) Adult entertainment establishment. "Adult entertainment establishment" means any establishment which displays entertainment which is distinguished or characterized by its emphasis depicting, describing or relating to sexual conduct or sexual excitement as defined in Section thirty-one of Chapter two hundred and seventy-two, M.G.L. (C.O. 93-504 sec.3 (part))

17.08.065(C) Adult motion picture theater. "Adult motion picture theater" means a building used for presenting material distinguished by an emphasis on matter depicting, describing or relating to sexual conduct or sexual excitement as defined in Section thirty-one of Chapter two hundred seventy-two, of M.G.L. (C.O. 93-504 sec.3 (part)

17.08.065(D) Adult use. "Adult use" means a use (whether partially or on its entirety) of a building or business for the purpose of engaging in the sale, display, hire, trade, exhibition or viewing of materials or entertainments depicting, describing, or relating to sexual conduct or sexual excitement as defined in Section thirty-one of Chapter two hundred seventy-two, of M.G.L. (C.O. 93-504 sec.3 (part)).

17.08.065(E) "Adult use advertisement sign. "Adult use advertisement sign" means an advertising sign or devise which advertises an adult entertainment use, adult bookstore, adult video store, or adult motion picture theater and/or advertises the trade, rental or sale of material distinguished by an emphasis on matter depicting, describing, or relating to sexual conduct or sexual excitement as defined in section thirty-one of Chapter two hundred seventy-two, of M.G.L. (C.O. 93-504 sec.3 (part)).

17.08.065(F) Adult video store. "Adult video store" means an establishment having as a substantial or significant portion of its stock in trade,

rental or sale, videos and other matter which are distinguished or characterized by their emphasis depicting, describing or relating to sexual conduct or sexual excitement as defined in Section thirty-one of Chapter two hundred seventy-two, M.G.L. (C.O. 93-504
sec. 3 (part)).

17.08.065(G) Substantial or Significant Portion. "Significant or substantial portion" means at least that portion of (i) retail sales accounting for at least twenty percent of gross sales or (ii) merchandise accounting for at least twenty percent of total merchandise available for sale or (iii) shelf-space and display space which when combined is in excess of eighty (80) square feet.

Section 2, Title 17, Chapter 17.16 of the Revised Ordinances of the City of Revere is hereby amended by deleting Section 17.16.045, and in place thereof, the following new Sections are inserted:

17.16.045(A) Adult entertainment establishment and businesses promoting Adult uses within the City of Revere. Based upon the experience of other communities, particularly the evident problems which existed in those portions of the City of Boston bordering and included within the so-called "Combat Zone", the City Council of the City of Revere finds that the proliferation of adult entertainment establishments (as said term is herein defined) will have an adverse on the community by, among other impacts, limiting economic development and reducing residential property values. Furthermore, the City Council finds that adult entertainment establishments, if situated near school, parks or conservation areas, houses of worship, nursery schools, day care centers, kindergartens or playgrounds would have an adverse impact on the youth of this City.

17.16.045(B) General Limitation. Notwithstanding any term or condition within the so-called Table of Uses within these Revised Ordinances, or any other provision of said Revised Ordinances, no adult entertainment establishments, adult bookstore, adult video store, adult motion picture theater and advertising signs or devices may be (i) erected, constructed placed altered converted or otherwise changed in any district other than the "I" District or (ii) erected, constructed, placed, altered, converted or otherwise changed without the issuance of a Special Permit issued by the City Council or (iii) erected, constructed placed, altered or converted if it is within three hundred feet of the line of any lot which itself contains either an adult entertainment establishment, adult bookstore, adult video store, adult motion picture theater or adult advertising signs or devices.

17.16.045(C) Special Permit Considerations for adult entertainment establishments and adult motion picture theaters. No special permit may be granted for any adult entertainment establishment or adult motion picture theater unless each of the following conditions are fully satisfied:

1. Adult entertainment establishments and adult motion picture theaters may not be located less than one thousand feet (1,000) from the nearest lot line of: each other; public or private nursery schools; public or private day care centers; public or private kindergartens; public or private elementary schools; public or private secondary schools; playgrounds; parks; conservation areas; houses of worship; residential uses; and residential districts.

2. A thirty foot-wide landscaped strip shall be provided along the property line fronting a public or private way.

3. No adult entertainment establishments or adult motion picture theater may be situated on any lot which is less than twenty-two thousand feet nor more than sixty-six thousand square feet.

4. Adult entertainment and adult motion picture theaters may not be allowed within a building containing other retail, consumer or residential uses.

5. No adult entertainment establishments and adult motion picture theaters shall be located within fifty feet of a public or private way and must be set back a minimum of fifty feet from all property lines.

6. A material condition to every special permit issued with respect to any adult entertainment establishment and adult movie theater shall that such establishment or theater must cease its business operations between the hours of 1 a.m. and 10 a.m. each day.

7. No adult entertainment establishment or adult motion picture theater may have visible from outside the establishment or theater any flashing lights.

8. No adult entertainment establishment or adult motion picture theater shall be eligible to apply for a special permit requesting a freestanding accessory sign.

9. Each applicant for a special permit to operate an adult entertainment establishment of adult motion picture must provide on a plan submitted with its application adequate parking on the same lot said establishment or theater in the following ratio: 1 parking space for every 1.25 person allowed for said establishment's seating capacity.

17.16.045(D) Special Permit Consideration for adult bookstores and adult video stores. No special permit may be granted for any adult bookstores or adult video stores (collectively said bookstores and video stores hereinafter referred to as "adult merchandise establishments") unless each of the following conditions are fully satisfied:

1. Adult merchandise establishments may not be located less than one thousand feet (1,000) from the nearest lot line of: each other; public or private nursery schools; public or private elementary schools; public or private secondary schools; playgrounds; parks; conservation areas; houses of worship; residential uses; and residential districts.

2. A twenty-five foot wide landscaped strip shall be provided along the property line fronting a public or private way.

3. No adult merchandise establishments may be situated on any lot which is less than sixteen thousand square feet more more [*sic*] than sixty-six thousand square feet.

4. Adult merchandise establishments may not be allowed within a building containing other retail, consumer or residential uses.

5. No adult merchandise establishments shall be located within thirty feet of a public or private way and must be set back a minimum of at least thirty feet from all property lines (unless applicable zoning regulations provide for a greater set back).

6. A material condition to every special permit issued with respect to any adult merchandise establishment shall that such establishment or theater must cease its business operations between the hours of 11 P.M. and 9 A.M. each day.

7. No adult merchandise establishment may have visible from outside the establishment or theater any flashing flights.

8. No adult merchandise establishment shall be eligible to apply for a special permit requesting a free-standing accessory sign.

17.16.045(E) Special Permit Consideration for Adult use advertisement signs. No special permit may be granted for any adult use advertisement signs unless each of the following conditions are fully satisfied:

1. Adult use advertisement signs may not be located less than one thousand feet (1,000) from the nearest lot line of: each other; public or private nursery schools; public or private day care centers; public or private secondary schools; playgrounds; parks; conservation acres; houses of worship; residential uses; and residential districts.

2. Adult use advertisement signs may only be located on a building in which there is operating either an adult merchandise establishment, adult entertainment establishment or adult movie theater pursuant to a special permit issued by the City Council.

3. The highest point on any adult use advertisement sign may be no higher than twenty-four feet above ground level.

4. No adult use advertisement sign may contain any moving, flashing or animated lights, or visible moving or movable parts.

17.16.045(F) Construction; conflicts. In the event that the applicable provision of the zoning ordinances set forth in these Revised Ordinances

imposes greater dimensional or setback requirements than do the provisions of ss 17.16.045 et seq., the greater requirements of the zoning ordinances shall apply. No structure shall contain both an adult merchandise establishment and either an adult entertainment establishment or adult movie theater.

April 24, 1995:	ORDERED to a first reading
May 1, 1995:	ORDERED to a second reading
May 1, 1995	ORDERED to a third and final reading.
May 1, 1995:	ORDERED ENGROSSED AND ORDAIN: on a Roll Call: Councillors Buonfiglio, Colarossi, Colell, DelGrosso, DiCarlo, Guinasso, Jordan, Penn, Penta and Fiore voting "YES." Councillor Caporale absent.

Attest: John J. Henry,
City Clerk

APPROVED:

/s/ ROBERT J. HAAS, JR.
MAYOR ROBERT J. HAAS, JR.

May 5, 1995
DATE

Attest:
/s/ John J. Henry
City Clerk

APPENDIX C

PAGES 1-111
VOLUME 4

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.
No. SUCV-1994-6879

SUPERIOR COURT
Department of the
TRIAL COURT

T&D VIDEO

V

CITY OF REVERE

Boston, Massachusetts
August 23, 2002
Before: J. Murphy

PAULA CONNELLY, CVR
OFFICIAL COURT REPORTER

EXCERPTS OF TRIAL TESTIMONY OF JOSEPH FERRUZZI

[40]

. . .

Q Now, let's stay on page 20. In this colloquy you had with Councilors Arigo and Kollella, you were asked, "What did they tell you?" and you said, "They expressed to me their concern that there was an adult video store going to be located in Revere someplace, possibly this location."

And you were asked, "Did they ask something about it?" and you responded --

MR. ZALEZNIK: Object, Your Honor.

THE COURT: Well, I mean, I'll hear what he --

MR. ZALEZNIK: He's holding the deposition.

THE COURT: Well, I know, but it's a question of whether or not this is coming into evidence, and the answer is it isn't. I'm just not -- this isn't admissible testimony **[41]** just because Mr. Alberich is reading from the deposition.

Q Well, when I asked you, "Did they ask you to do something about it," what was your response to that, according to this deposition transcript? The top of page 21.

A Page 21, line 1 and 2 says, "To my recollection, they asked me to not allow it."

Q Is that accurate? Is that what you said?

A To the best of my recollection, correct.

THE COURT: You mean is that what he said to them or is that what he said on this deposition or?

MR. ALBERICH: Is that what he said in his deposition.

A That's what I said in my deposition, yes.

And that was a truthful statement, correct?

A To the best of my knowledge, yes.

Q Okay. And then you were asked, **[42]** "What did they mean by not allowing?" And what was your answer to that question?

A Line 5, "To not issue --"

Well not line 5, you can just tell me. Does line 5 accurately describe your answer to that question during the deposition?

A Yes.

Q Okay. And what does it say?

A To not issue permits for that use.

Q Okay. And you were asked then, on line 9, "What did you say about that?" And to the best of your recollection, what did you say when they asked you not to issue permits for that place?

MR. ZALEZNIK: Object, Your Honor.

THE COURT: I'm going to overrule the objection

Q What did you say?

THE COURT: You may answer.

Q What did you say, Mr. Feruzzi?

A At that point in time, the zoning ordinance did not prohibit that use.

Q And that's what you told them?

[43]

A Yes.

Q Okay. And then you were asked, "What was the response to your informing the city councilors that it wasn't prohibited by the ordinance?" And

to the best of your recollection, how did you respond to that question?

A Could you rephrase that, please?

Q When you were asked what was the response to your informing these city councilors that it wasn't prohibited by ordinance, how did you respond to that question in the deposition?

A I didn't respond.

Q You responded to the question.

A Oh, okay. I'm sorry. I'm getting a little confused.

Their response, as I stated in the deposition, that they would then, as city councilors who write the zoning ordinance, they would get together with the city planner and draft an ordinance.

Q Well, let's be a little clearer on this. The question asked to you was, "What **[44]** was the response to your informing these city councilors that it wasn't prohibited by an ordinance?" Your answer is, "They would get together with the city planner and draft one." Correct?

A Correct.

Q All right. And is that an accurate statement of your answer to that question?

A Yes.

Q Okay.

MR. ALBERICH: I have no further questions, Your Honor.

. . .

APPENDIX D

PAGES 1-151
VOLUME 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.
No. SUCV-1994-6879

SUPERIOR COURT
Department of the
TRIAL COURT

T&D VIDEO

V

CITY OF REVERE

Boston, Massachusetts
August 22, 2002
Before: J. Murphy

PAULA CONNELLY, CVR
OFFICIAL COURT REPORTER

EXCERPTS OF TRIAL TESTIMONY OF FRANK L. STRINGI

[48]

. . .

Q Mr. Stringee, prior to drafting the 1993 ordinance, you never investigated to see if there were any adult book stores in Revere, did you?

A No, I did not.

Q And prior to drafting the ordinance, you never investigated to see whether there were video stores selling adult videos in Revere, did you?

A No.

Q And you were not aware, at the time you were drafting this ordinance, that there were video stores in Revere selling adult videos; is that correct?

A That's correct.

Q And you were not aware, consequently, that those video stores were within a hundred and two hundred feet of **[49]** residential areas, correct?

A Correct.

Q So prior to drafting the ordinance, you never detected any neighborhood deterioration for increased crime in the neighborhoods that surrounded those stores where adult videos were being sold, did you?

A No.

Q Now, you said that you obtained information -- you said in your deposition that you obtained some of the dimensional requirements -- at least a thousand foot setback dimensional requirements -- that you used in the Revere ordinance from the Stoughton & Peabody ordinance; is that correct?

A You mean a hundred foot?

Q A thousand foot dimensional. The thousand foot --

A Setback?

Q I'm sorry. If I said setback –

A I think you did say setback.

Q The thousand foot dimensional **[50]** requirements -- a thousand feet from neighborhood schools, parks -- you said you obtained from the Stoughton & Peabody ordinances?

A I obtained from those ordinances that they had included setbacks from residential areas and sensitive receptors in their ordinances.

Q Okay. What were the degrees of separation, let's put it that way, of adult uses to neighborhoods in those ordinances; do you remember?

A I believe Stoughton was 750 feet. Peabody was less than that.

Q In fact, in the Peabody ordinance, isn't it true that the only requirement for adult bookstores is that they be 200 feet from residential areas? Do you recall that?

A Yes.

Q So when you were testifying before about where you could place all adult uses, by virtue of this thousand feet requirement you're putting in, that thousand foot requirement was your idea?

[51]

A It was my idea and I also saw that in the "Land/Use Manager," back in 1983, that there was a town -- I can't remember the town, but they had included a thousand foot pre--qualifier.

Q But you chose a thousand?

A Sure.

Q And if you had chose 200 or 750 or 500, there might have been other areas in Revere, aside from the general industrial area, where adult uses could have been sited, correct?

A Not 500. I think less than 500 you'd have more flexibility. Even with 500, it's very tight.

Q Well, if you made it, for instance, 250 feet for bookstores and videos and 500 feet for live dance entertainment, there would have been many more sites in Revere that could have had adult uses, correct?

A Yes.

Q Now, you testified before that your thoughts about neighborhood **[52]** deterioration came from your experiences with the Surf, correct?

A And the Squire Lounge.

Q And the Squire Lounge. Both of which are bars, correct?

A Yes.

Q That provide live, not nude, dance entertainment?

A Nude dance entertainment, yes.

Q But you had testified in your deposition that when you drafted the adult ordinance, based on your opinions, that your opinion was that any type of adult use would have the same affect on a residential neighborhood, regardless of the different types of adult entertainment, correct?

A That's my opinion.

Q And that certainly influenced the dimensional requirements that you put into the ordinance, correct?

A Yes.

Q Not only in terms of using a thousand feet, but using a thousand feet for everything; adult bookstores, adult video **[53]** stores, correct?

A Correct.

Q And in your view, you testified the negative affects on the neighborhood would be the same, regardless of whether an adult use was a video store or a bar featuring live, nude entertainment, correct?

A Correct

Q But you also testified that there are -- you have no studies or reports or any other information that supported that view, correct?

A In my own -- my own opinion, my own observations of adult uses in the City of Revere.

Q You testified that that was your observations on the Squire Lounge and the Surf?

A I don't differentiate between a lounge or a video store. They still sell the same material, and that's sexually related

Q Okay. So anything, if it's sexually related, gets the same kind of **[54]** treatment, correct?

A You're going to get the same person that goes to an adult video store go to the Squire Lounge.

Q To get back to my question, you didn't have any studies or reports or anything else that indicated that adult video stores or bookstores needed the same kind of separation as bars featuring live, nude entertainment?

A No. There was nothing documented that I could put my hands on.

Q And you drafted the ordinance based on your opinion that every adult use required, quote, "the strictest regulations," correct?

A Yes.

Q And from your discussions with Mr. Arigo, you had an understanding that he, too, wanted to impose the strictest regulations on adult entertainment, right?

A Yes.

Q And in determining the adult ordinance provisions that you were going to **[55]** use, and you used, quote, "the harshest measures possible," end quote, correct?

A The harshest measures possible but still allowing adult uses to exist within the community.

Q But you've testified under oath that you chose the harshest measures possible, correct?

A Yes.

Q And when you spoke to the members of the planning board, as you said you did at that public hearing, did you discuss with them the secondary affects that you were concerned about and how each of these provisions were supposed to address those secondary affects?

A I believe I did.

Q You did. Did you tell them that you were looking to use the harshest measures possible?

A Yes.

Q You did. And did you tell them that this was drafted in order to treat all adult uses the same because, in your view, **[56]** all adult uses would have the same impact on the neighborhood.

A Yes.

Q. And you testified that, in your opinion, the people who seek to rent an adult video must be interested in prostitution, which creates more crime in Revere; is that correct?

A. Yes.

MR. ZALEZNIK: Object, Your Honor.

THE COURT: Overruled.

Q. But you have no factual basis for that opinion?

A. It's my own observation of the community.

Q. But you said that you were not even aware that there were adult video stores -- that there were video stores in Revere selling adult videos in

neighborhoods prior to drafting this law: isn't that correct?

A. Right.

. . .

APPENDIX E

The City of REVERE, MASSACHUSETTS
OFFICE OF THE MAYOR
281 BROADWAY, REVERE, MA 02151
(617) 286-8110 •FAX (617) 286-8199

September 16, 1993

Honorable City Council
Revere City Hall
Revere, MA 02151

Dear Members:

Please find attached an ordinance amendment regulating Adult Uses such as adult entertainment establishments, adult bookstores, adult videostores, adult motion picture theatres and adult use advertising signs. The Zoning Ordinance of the City of Revere presently does not provide adequate protection against such uses in terms of preserving community standards and character. It is the intent of this ordinance to properly regulate adult uses and advertisement signs in conformance with Chapter 40A Section 9a of the Zoning Enabling Act.

The attached Adult Use Ordinance regulates adult uses by special permit within the Industrial District under a set of specific and restrictive conditions which have been designed to preserve the general welfare and character of our predominantly residential community.

It must be noted that under the State Zoning Enabling Act, communities cannot totally prohibit adult uses but are authorized to regulate such uses via the special permit process. Since the present zoning

ordinance does not afford this protection, it is strongly encouraged that Your Honorable Body authorize advertisement of this amendment.

Respectfully,

/s/ Robert J. Haas, Jr.
Robert J. Haas, Jr.
Mayor

C: Frank Stringi, City Planner
Richard Villiotte, City Solicitor
Joe Ferruzzi, Building Inspector

APPENDIX F

PAGES 1-151
VOLUME 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.
No. SUCV-1994-6879

SUPERIOR COURT
Department of the
TRIAL COURT

T&D VIDEO

V

CITY OF REVERE

Boston, Massachusetts
August 22, 2002
Before: J. Murphy

PAULA CONNELLY, CVR
OFFICIAL COURT REPORTER

EXCERPTS OF TRIAL TESTIMONY OF RICHARD PENN

[139]

. . .

Q To the best of your knowledge, Mr. Penn, when the city council was considering the adult zoning ordinance, both at its October '93 and November '93 meetings, there were no documents before the city council relating to the supposed secondary affects of adult entertainment on surrounding neighborhoods, correct?

MR. ZALEZNIK: Objection.

THE COURT: I'm going to let him answer that. Overruled.

To the best of your knowledge, did you see any documents having to do with --

THE WITNESS: To the best of my knowledge, I do not recall any documents.

[140]

Q And you and the city council members received no such materials or information in conjunction with your consideration of the ordinance back in November of '93, correct?

MR. ZALEZNIK: Object, Your Honor.

THE COURT: Overruled.

Q Your answer?

A I do not recall any such documents

Q Okay. And the city council never voted or requested or commissioned any kind of an investigative report on possible secondary affects for the various kinds of adult entertainment prior to considering this ordinance, correct?

MR. ALBERICH: Object, Your Honor.

THE COURT: Overruled.

A That is correct.

Q And at the time it was considering, or before it considered this particular ordinance, the city council didn't investigate or commission any investigation of secondary affects of the **[141]** existing adult entertainment establishments in the City of Revere, correct?

MR. ALBERICH: Object, Your Honor.

THE COURT: Overruled.

A The city council did not request such information.

Q Did the city council ask any officials, such as the zoning or tax officials, for any information regarding the provisions in the adult ordinance that dealt with lot size restrictions and setbacks and what the impact of all of those would be?

MR. ALBERICH: Object, Your Honor.

THE COURT: Overruled.

A Not to my knowledge.

Q And did you ever ask for any such information individually?

A No, I did not

Q And you never had any discussions with Mr. Stringee about the adult entertainment ordinance before the city council before you voted on it in October or November of '93, correct?

A No, I did not.

. . .

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APPENDIX G

PAGES 1-151
VOLUME 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.
No. SUCV-1994-6879

SUPERIOR COURT
Department of the
TRIAL COURT

T&D VIDEO

V

CITY OF REVERE

Boston, Massachusetts
August 22, 2002
Before: J. Murphy

PAULA CONNELLY, CVR
OFFICIAL COURT REPORTER

EXCERPTS OF TRIAL TESTIMONY OF JOHN ARIGO

. . .

[146]

Q And you testified at your deposition that you felt that if the Peabody ordinance was past in Peabody then you could pass the same ordinance in Revere, correct?

A Correct

Q All right. And that was -- you spoke to Mr. Stringee and he told you that Peabody had passed this ordinance, that was essentially all he told you about the Revere ordinance before you voted for it, correct?

MR. ZALEZNIK: Object, Your Honor.

THE COURT: I'll allow that. Overruled.

A I don't -- like, again, when we talked Peabody, I don't know if it was specifically -- and I can't remember -- just for adult video. We were looking at any --

THE COURT: Well, he's referring, sir, to the Peabody ordinance dealing with **[147]** adult entertainment.

THE WITNESS: That's what I'm saying, but --

THE COURT: No, no. He's asking you a specific question. Did you talk with Mr. Stringee about anything else other than if the ordinance had been enacted in Peabody, why not do it in Revere? Was there anything else about adult entertainment that you and Mr. Stringee discussed, that's the question.

THE WITNESS: No.

THE COURT: Okay. Fine. The answer is no.

Q At the time you were considering the adult entertainment ordinance, the city council had no evidence in front of it to show that all adult video stores or all adult uses would have the same negative affects on neighborhoods of Revere, correct?

MR. ZALEZNIK: Object, Your Honor.

THE COURT: I'll overrule it. Do you remember any evidence about affects?

THE WITNESS: No, not really.

[148]

THE COURT: Okay. He answered no.

Q And at the time, when this whole business came up of an adult use ordinance, you testified that what you really would like to do is just block all adult uses anyway, correct?

MR. ZALEZNIK: Object, Your Honor.

THE COURT: I'll allow it. Overruled.

A I said that I think in my deposition, but I mean at the testimony, it wasn't -- an adult video wasn't a big deal to me. I mean, it was -- like I said, I had a lot more worry than adult video.

Q All right.

A I mean, I think it was in my ward and if people go there, they don't -- for me, I don't really care less. I mean --

THE COURT: Okay.

Q You testified, too, that if adult uses were required to have a special permit, and you can't see why you couldn't just reject adult use requests across the board, correct?

[149]

A That's right. That's what I --

MR. ZALEZNIK: Object, Your Honor.

THE COURT: I'll allow it.

A That's right, but I think Mr. Stringee -- a lot of things –

THE COURT: Can you say the state of mind that the city council may have some bearing?

THE WITNESS: You know, transfer stations, they couldn't -- there were a lot of things that I said let's just reject them -across the board, then I was told by Mr. Stringee we just can't do that. You know, you had to do -- allow things. So my concern was like anything else, de-buffer zones, I don't care, make it as stringent as possible or anything. I mean, on any –

Q Okay. That's fine.

A Okay.

MR. ALBERICH: Nothing further.

. . .

APPENDIX H

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 94-6216A

T & D VIDEO, INC.
d/b/a MOONLITE READER

v.

THE CITY OF REVERE, MASSACHUSETTS,
THE ZONING BOARD OF APPEALS OF
THE CITY OF REVERE, MASSACHUSETTS,
EDWARD ELFMAN, as Chairman of the
Zoning Board of Appeals of Revere,
ALFRED BUCCILLI, as Member of the
Zoning Board of Appeals of Revere,
ANTHONY GIANNINO, as Member of the
Zoning Board of Appeals of Revere,
PETER LATTANZI, as Member of the
Zoning Board of Appeals of Revere,
JOHN J. VERRENGIA, as Member of the
Zoning Board of Appeals of Revere, and
JOSEPH FERRUZZI, as Building Inspector
of Revere

FINDINGS OF FACT, RULINGS OF LAW, AND JUDGEMENT

. . .

3. T&D Video has a constitutionally protected right to engage in the sale of non-obscene "adult" video tapes. T&D Video, Inc. v. City of Revere, 423 Mass. 577, 580 (1996). Counsel for both sides forcefully and ably presented at trial detailed arid focused evidence on the issue of the City's "intent" in enacting the Ordinances in

question — i.e. whether this court should view the Ordinances as patent prior restraint on speech or merely content-neutral time, place and manner regulation of adult entertainment. T&D Video asserts that the totality of the evidence demonstrates conclusively that Revere directed the ordinance specifically at T&D Video. The court concurs. Particularly, the enactment of the 1993 Ordinance, on September 16, 1993, two days after T&D sought a business certificate, evidences Revere's intention to single out T&D. See 754 Orange Ave., Inc. v. City of West Haven, 761 F.2d 105, 113 (2nd Cir. 1985). Because the 1993 Ordinance leaves no location available lawfully to conduct T&D Video's business, and the 1995 Ordinance has the same preclusive effect, the Ordinances — although concededly "content-neutral" [see, e.g., City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728 (2002)] -- collectively operate as impermissible prior restraint, leaving reasonable alternative avenues of communication of adult-based content unavailable, and not as a reasonable so-called "time, place, and manner restriction." See Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76 (1981). See also City of Los Angeles v. Alemeda Books Inc., supra, at 1737.

. . .

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK COUNTY **NO. 2005-P-0109**

T&D VIDEO, INC. D/B/A MOONLITE READER
Plaintiff-Appellee

v.

CITY OF REVERE, et al.,
Defendants-Appellants

ON APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT

Brief for the Defendants-Appellants City of Revere, et al.

For the Defendants-Appellants:

Ira H. Zaleznik, Esquire
Lawson & Weitzen, LLP
88 Black Falcon Avenue, Suite 345
Boston, MA 02210
(617) 439-4990

. . .

[33] Commission issued regulations that barred the newspaper company from selling papers from street coin operated newsracks. While noting that the newsracks were an efficient and cost-effective method of distributing the papers, the Court held that the regulation was constitutionally valid. Even though the regulation banned the street newsrack form of distribution in its entirety, there were ample other methods available to the paper to have its product distributed.

In this case, the facts are undisputed in the record that the same adult videos are readily available for sale, consistent with the provisions of the zoning ordinance, at numerous locations throughout Revere. In these circumstances., the requirement that there be reasonable alternative avenues of communication is satisfied, and the ordinance should not have been struck down by the Judge. Accordingly, this Court should reverse the judgment below, and direct the entry of a new judgment upholding the ordinance and dismissing this action.

III. THE TRIAL JUDGE FAILED TO APPLY APPROPRIATE LEGAL STANDARDS IN AWARDING LEGAL FEES AND COSTS TO T&D

A. T&D's Application Should Have Been Denied In Its Entirety Since It Reflected a Total Lack of Billing Judgment And Was Grossly Excessive

The Trial Judge, while noting the authority relied upon by Revere, concluded that the fee petition submitted **[34]** by T&D did not "shock the conscience" and should not be disallowed in full. App. 724. In reaching this conclusion, the Trial Judge abused the discretion granted to him in allowing a recovery of attorneys fees.

The fee petition of T&D, seeking almost one and a quarter million dollars, was outrageous in the extreme. In these circumstances, a Court is virtually compelled to deny all fees. As explained by the First Circuit Court of Appeals in *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st dr. 1991) approving of the Seventh Circuit's analysis in *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980):

> "On the other hand, there must come a point where what is sought is plainly improper. We therefore agree with that circuit's complete denial of fees in *Brown v. Stackler*, 612 F.2d 1057 (7th Cir.1980), even though there was a recovery. There the court said,
>
> > [A]ppellant's counsel submitted a claim which was so intolerably inflated that the District Court was warranted in departing from the usual practice and reacting vigorously to prevent such abuse of the court's authority to award reasonable compensation to counsel.
> >
> > If, as appellant argues, the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would **[35]** be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to

> what they should have asked for in the first place.
>
> 612 F.2d at 1059. This is strong medicine, but for this blow-up of a routine street arrest on a citizen's call, and inexcusable reaching for fees-to the burden of the court-we believe it entirely appropriate. A request for attorney's fees is required to be in good faith and in reasonable compliance with judicial pronouncements, and not an opening gambit in negotiations to reach an ultimate result. The statute give us discretion, 42 U.S.C. §1988, and the departure here was too extreme to be tolerated."

Most circuits, when confronted with an outrageous request, have followed the rule of the First Circuit in Lewis. For example, in *Scharn v. District Courts Trying Criminal Cases*, 148 F.3d 554 (5th dir. 1998), the Fifth Circuit, citing *Lewis* and *Brown*, denied all fees to a prevailing plaintiff when the fees sought were grossly disproportionate to a fair and reasonable fee. In *Scham*, counsel sought compensation for 936 hours of work at the rate of $350 per hour, or three times the average rate for practitioners with comparable experience in the area. The Court concluded that the District Court decision to deny all fees had to be affirmed. As the Fifth Circuit Court of Appeals stated, 148 F.3d 554, 559, quoting from **[36]** *Fair Housing Council of Greater Washington v. Landow*, 999 F.2d 92 (4th Cir. 1993):

> "We realize that the district court's remedy here is extreme, but we are reluctant to reverse inasmuch as doing so would serve to condone and encourage such outrageous petitions. As

> the Fourth Circuit has reasoned, appellants in this case intended to submit an outrageously excessive fee petition in the hope that the district court would at least award some, preferably high, percentage of the requested fees. We believe Congress did not intend to foster such gamesmanship when it enacted the Civil Rights Attorney's Fees Act of 1976. Rather, the clear intent of Congress was to provide reasonable fees to prevailing parties. Our decision today seeks to further that purpose by encouraging attorneys *at the outset to request only reasonable fees and to provide the necessary assistance to the district court for determining a reasonable fee.*" (Emphasis added).

Notwithstanding the admonition of the First, Fourth, Fifth and Seventh Circuits, T&D, in this case, submitted a grossly bloated, outrageously excessive request for fees and costs. T&D's fee petition ought to have suffered the same fate as the petitions in *Lewis*, *Scham*, *Landow* and *Brown*, and the Trial Judge should have denied the petition in its entirety.

The Supreme Court and the circuits have consistently held that the essence of any application for fees is the exercise of billing judgment, just as would be done in the private sector. The filing of a fee petition is not to be the opening bid in a gambit for fees. As the Supreme Court explained in *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983):

. . .

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APPENDIX J

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. **APPEALS COURT NO. 2005-P-109**
FAR NO.

T&D VIDEO, INC. D/B/A MOONLITE READER
Plaintiff-Appellee

v.

CITY OF REVERE, et al.,
Defendants-Appellants

ON APPEAL FROM JUDGMENTS
OF THE SUPERIOR COURT

Application of Defendants-Appellants City of Revere, et al., for Further Appellate Review

---

For the Defendants-Appellants:

Ira H. Zaleznik, Esquire
(BBO#538800)
Lawson & Weitzen, LLP
88 Black Falcon Avenue, Suite 345
Boston, MA 02210
(617) 439-4990

. . .

[10]

V. FURTHER APPELLATE REVIEW IS NECESSARY AND APPROPRIATE

Further appellate review is necessary and appropriate in this case since this matter involves important principles of constitutional law and public policy of broad application. The decision of the Appeals Court, if undisturbed, will result in the requirement that all cities and towns in the Commonwealth make provision for adult uses, regardless of the character of the community and the availability of such entertainment elsewhere. With respect to the fee petition, the decision of the Appeals Court will eviscerate the rule of *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991) and ensure that no fee petition, no matter how outrageous or disorganized, will be subject to denial. The effect of this decision, if not reviewed by this Court, will do lasting harm to constitutional principles and civil rights litigation throughout the Commonwealth.

As set forth above, the Trial Judge's conclusion, endorsed by the Appeals Court, that there was no area in Revere that T&D could locate, was erroneous. However, even if one were to conclude that this finding was correct, the ordinance would nonetheless be constitutional. The undisputed evidence in the record shows that the adult videos like the ones sold by T&D were readily available at conventional video store . . .

[14]

. . . with the provisions of the zoning ordinance, at numerous locations throughout Revere. In these circumstances, the requirement that there be reasonable alternative avenues of communication is satisfied, and the ordinance should not have been

struck down by the Appeals Court and the Trial Judge. Accordingly, this Court should grant further appellate review, reverse the judgment below, and direct the entry of a new judgment upholding the ordinance and dismissing this action.

Finally, as to the Appeals Court's disposition of the judgment for attorneys fees and costs, Revere would suggest that the conscience of the Appeals Court needs sharpening. The Appeals Court decision noted that "this fee request certainly approaches the outermost parameter that separates an acceptable application from one that 'shocks the conscience.'" See 66 Mass.App.Ct. at 476. Revere respectfully suggests that the fee petition did not merely "approach" the "outermost parameter," but clearly crossed the line. T&D sought compensation for over four thousand hours of legal time. The amount of compensation sought approached one and one quarter million dollars. To attempt to shift this burden to the taxpayers of Revere is unconscionable, and should not be permitted in any amount.

This rule is the prevailing one in the circuits. As explained by the First Circuit Court of Appeals in *Lewis* **[15]** *v. Kendrick*, 944 F.2d 949, 958 (1st dir. [*sic*] 1991) approving of the Seventh Circuit's analysis in *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th dir. [*sic*] 1980)

> "On the other hand, there must come a point where what is sought is plainly improper. We therefore agree with that circuit's complete denial of fees in *Brown v. Stackler*, 612 F.2d 1057 (7th Cir.1980), even though there was a recovery. There the court said,
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> was so intolerably inflated that the District Court was warranted in departing from the usual practice and reacting vigorously to prevent such abuse of the court's authority to award reasonable compensation to counsel.
>
> If, as appellant argues, the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place.

612 F.2d at 1059. This is strong medicine, but for this blow-up of a routine street arrest on a citizen's call, and inexcusable reaching for fees-to the burden of the court-we believe it entirely appropriate. A request for attorney's fees is required to be in good faith and in reasonable compliance with judicial pronouncements, and not an opening gambit in negotiations to reach an ultimate result. The statute give us discretion, 42 U.S.C. §1988, and the departure here was too extreme to be tolerated."

Most circuits, when confronted with an outrageous request, have followed the rule of the First Circuit in **[16]** Lewis. For example, in *Scham v. District Courts Trying Criminal Cases*, 148 F.3d 554 (5th dir. 1998), the Fifth Circuit, citing *Lewis* and *Brown*, denied all fees to a prevailing plaintiff when the fees sought were grossly disproportionate to a fair and reasonable fee. In *Scham*, counsel sought compensation for 936 hours of work at the rate of $350 per hour, or three times the average rate for practitioners with comparable experience in the area. The Court concluded that the District Court decision to deny all fees had to be affirmed. As the Fifth Circuit Court of Appeals stated, 148 F.3d 554, 559, quoting from *Fair Housing Council of Greater Washington v. Landow*, 999 F.2d 92 (4th Cir. 1993)

> "We realize that the district court's remedy here is extreme, but we are reluctant to reverse inasmuch as doing so would serve to condone and encourage such outrageous petitions. As the Fourth Circuit has reasoned, appellants in this case intended to submit an outrageously excessive fee petition in the hope that the district court would at least award some, preferably high, percentage of the requested fees. We believe Congress did not intend to foster such gamesmanship when it enacted the Civil Rights Attorney's Fees Act of 1976. Rather, the clear intent of Congress was to provide reasonable fees to prevailing parties. Our decision today seeks to further that purpose by encouraging attorneys *at the outset to request only reasonable fees and to provide the necessary assistance to the district court for determining a reasonable fee.*" (Emphasis added).

Notwithstanding the admonition of the First, Fourth, Fifth and Seventh Circuits, T&D, in this case, submitted a grossly bloated, outrageously excessive request for **[17]** fees and costs. T&D's fee petition ought to have suffered the same fate as the petitions in *Lewis*, *Scham*, *Landow* and *Brown*, and the Appeals Court and the Trial Judge should have denied the petition in its entirety.

The Appeals Court recognized these principles but failed to give them effect by simply vacating the fee award and remanding the matter to the Superior Court for a recalculation of the award. This Court should correct the error, vacate the award, and direct the entry of a new judgment denying T&D all fees.

VI. CONCLUSION

For all of the foregoing reasons, Defendants-Appellants City of Revere, et al., respectfully request this Honorable Court to grant this application for further appellate review.

Respectfully submitted,

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FILED
MAY 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-887

IN THE

Supreme Court of the United States

CITY OF REVERE, ET AL.,

Petitioners,

v.

T&D VIDEO, INC., D/B/A MOONLITE READER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF FOR PETITIONERS

IRA H. ZALEZNIK
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Boston, MA 02210
(617) 439-4990

Dated: May 16, 2007

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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REPLY BRIEF FOR PETITIONERS

I. REVERE PROPERLY RAISED AN IMPORTANT FEDERAL QUESTION IN THE PROCEEDINGS BELOW

In their opposition to the petition for certiorari, Respondent T&D Video, Inc. d/b/a Moonlite Reader ("T&D") contends that Petitioners City of Revere, et al. ("Revere") failed to raise the federal question as to the standard for a complete denial of all fees in a petition under 42 U.S.C. Section 1988 in the proceedings below. This claim is demonstrably incorrect, as Revere expressly and consistently raised the issue in the courts below.

In the Trial Court, as the Trial Judge noted, Revere argued that T&D's request for fees should be denied in its entirety because it reflected a "total lack of billing judgment and is grossly excessive." See Appendix to Petition for Writ of Certiorari ("App.") p. 17a. The Trial Court declined to deny all fees, citing the "shock the conscience" standard, as well as the "excessive or egregious" and "special circumstance" standards. See App. 17a-18a.

On appeal to the Appeals Court, Revere raised the same argument that had been pressed in the Court below. See App. 42a. In its brief to the Appeals Court, Revere captioned the entire section as follows: "The Trial Judge Failed to Apply Appropriate Legal Standards In Awarding Legal Fees and Costs to T&D." The subsection argument continued with the title, "T&D's Application should have been denied in its entirety since it reflected a total lack of billing judgment and was grossly excessive." See Brief for Revere to Appeals Court p. 33, attached to T&D's Opposition as Appendix I, p. 38a. Extended discussion of the differences in the approach in the circuits was unnecessary since Revere relied upon the

binding authority in the First Circuit, *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991).

After the Appeals Court decision, Revere continued the same argument in its application for further appellate review to the Supreme Judicial Court. In portions of the application that T&D did not reproduce in its appendix, Revere argued that review by the Supreme Judicial Court was important because of the Appeals Court's failure to assess properly T&D's fee application.[1] Indeed, Revere set forth the issue for review as "Whether T&D's request for an award of attorneys fees was so excessive as to require a denial of all fees under the rule of *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991)?" See Appendix A hereto, at A. 3a. Accordingly, the federal question that Revere has presented in its petition to this court was raised at every step of the proceedings below, and was actually passed upon by the courts below. It is therefore ripe for review in this court. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982).

Finally, T&D contends that the circuit conflict pointed to by Revere is merely the result of "semantic differences." See Opposition of T&D at p. 11. This Court has recognized, however, that the "shock the conscience" test sets a standard that far exceeds even deliberate misconduct. For example, in *Moran v. Burbine*, 475 U.S. 412, 424 (1986), this court condemned the police practice of deliberately misleading a lawyer for a criminal suspect. The Court

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[1] An application for further appellate review, under Massachusetts practice, is not a brief on the merits. Instead, it is similar to a petition for certiorari before this Court. See Reporter's Notes - 1973 to Rule 27.1, Massachusetts Rules of Appellate Procedure.

concluded, however, that the misconduct did not rise to the level of "misbehavior that so shocks the sensibilities of civilized society. . ." *Id.* at 433-434.

Far from a semantic difference, the "shock the conscience" standard, if permitted to stand, will eviscerate the rule, adopted by most of the circuits, that a grossly excessive or bad faith fee application should be denied in its entirety, as opposed to reduced to a reasonable level. To ensure that this remedy remains available to the lower courts, this court should grant certiorari to review and correct the decision of the Appeals Court.

II. THE REVERE ZONING ORDINANCE IS TO BE GIVEN INTERMEDIATE SCRUTINY

T&D's argument, like the decision of the Appeals Court, presumes that the Revere zoning ordinance must be examined under the strict scrutiny standard. According to T&D and the Appeals Court, because the ordinance, combined with existing environmental regulations and conditions on the ground, has the effect of preventing the operation of *any* adult video store, then the ordinance is a "ban," is not content neutral and is not a time, place and manner restriction on expression. See Brief for T&D p. 15. This position does not conform with the decisions of this Court.

Determining the level of scrutiny to apply depends upon the purpose of the ordinance. If the ordinance is designed to suppress expression, then it is content based and strict scrutiny will apply. See *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000), citing *Texas v. Johnson*, 491 U.S. 397, 403 (1989) and *United States v. O'Brien*, 391 U.S. 367, 377 (1968). If, on the other hand, the purpose of the ordinance is unrelated to the

suppression of expression, then intermediate scrutiny is the appropriate standard. *Erie, supra* at 289.[2]

Based upon these well established standards, the Revere ordinance is a content neutral time, place and manner restriction subject to intermediate scrutiny. Like the ordinance in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Revere ordinance, on its face, is directed to the secondary effects of adult entertainment uses. *Id.* at 47. Similarly, the ordinance is not concerned with the content of the entertainment. If it were, it would not permit *any* adult videos from being sold or rented. App. 39a n.8.

In this regard, T&D's characterization of the Revere ordinance as a "complete ban on adult video stores" confuses a means of expression with the expression itself. T&D's analysis is inconsistent with the prior decisions of this Court. See Opposition p. 15. Contrary to T&D's suggestion that there is not a single decision of this Court that would permit the elimination of adult video stores in a community, this Court's decisions in *Erie, supra* at 293-294, *Frisby v. Schultz*, 487 U.S. 474 (1988), *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *United States v. O'Brien*, 391 U.S. 367 (1968) all represent decisions that upheld restrictions that severely limited, or even barred, a means of expression in furtherance of a substantial governmental interest.

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[2] The Appeals Court specifically rejected T&D's claim that the Revere ordinance was passed to prohibit T&D's operation. App. 36a-37a. See T&D's opposition to petition, at pp. 26-27. The conclusion of the Appeals Court, that "unspoken legislative motivations do not appear to us to be relevant in assessing whether an ultimate legislative product is a permissible time, place, and manner restriction," is a correct statement of principles adopted by this Court. See *Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000).

T&D's remaining contentions are all based upon applying strict scrutiny standards to the Revere ordinance. For example, T&D's arguments that the legislative record was "barren" and therefore Revere cannot justify the substantial governmental interests behind the ordinance were largely addressed in this Court's decisions in *Erie v. Pap's A.M.*, 529 U.S. 277, 297-298 (2000) and *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439-441 (2002).[3] Similarly, the claim that the ordinance conditions the right of speech on compelled speech is no different from the position that the ban on complete nudity in *Erie* "compelled" speech from the dancers, or that the restrictions on demonstrations in *Clark*, *Frisby*, or *O'Brien* "compelled" the speakers to change their speech to the government's liking in order to be heard. Finally, the tailoring requirement is far different under intermediate scrutiny than that required in a strict scrutiny context. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 n.6 (1989).

If this Court were to uphold the standards as set forth by T&D, then the only way that a zoning ordinance regulating adult entertainment could pass constitutional muster would be if a municipality made *ample* land area available for an adult video store. Such land would have to be made available regardless of the character of the community, the nature of adjoining uses, or a host of other typical zoning considerations. This Court's cases require no such result and this Court should grant certiorari to ensure

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[3] At trial, T&D failed to mount a real challenge to the substantial interests advanced by Revere to justify the ordinance. The Trial Judge and the Appeals Court passed on the point, going directly to the reasonable alternative avenues of communication prong of the *Renton* arralysis. See App. 35a.

that appropriate standards are applied to the evaluation of a municipal zoning ordinance.

CONCLUSION

For all of the foregoing reasons, as well as the grounds advanced in the petition for a writ of certiorari, this Court should grant the petition.

Respectfully submitted,

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Dated: May 16, 2007

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. **APPEALS COURT NO. 2005-P-109**
FAR NO.

T&D VIDEO, INC. D/B/A MOONLITE READER
Plaintiff-Appellee

v.

CITY OF REVERE, et al.,
Defendants-Appellants

ON APPEAL FROM JUDGMENTS
OF THE SUPERIOR COURT

Application of Defendants-Appellants City of Revere, et al., for Further Appellate Review

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK COUNTY Appeals Court No. 2005-P109
F.A.R. NO:

T&D VIDEO, INC. D/B/A MOONLITE READER
Plaintiff-Appellee

v.

CITY OF REVERE, ET AL.,
Defendants-Appellants

APPLICATION OF DEFENDANTS-APPELLANTS
CITY OF REVERE, ET AL.,
FOR FURTHER APPELLATE REVIEW

I. REQUEST FOR FURTHER APPELLATE REVIEW

In accordance with Rule 27.1 of the Massachusetts Rules of Appellate Procedure, Defendants-Appellants City of Revere, et al., ("Revere") hereby request further appellate review by the Supreme Judicial Court of the opinion and judgment of the Appeals Court. Further appellate review is sought since the Appeals Court decision misinterprets the First Amendment and materially interferes with the rights of municipalities to regulate land uses within their boundaries. The Appeals Court decision also fails to follow established precedent in remanding the matter to the lower court to recalculate an award of attorneys fees. Established precedent and sound public policy mandate that a fee award should be denied in this case to the plaintiff T&D Video, Inc. d/b/a **[1]** Moonlite Reader ("T&D").

Permitting the Appeals Court decision to stand (and allowing the Superior Court to recalculate an award of attorneys fees) will give a license to plaintiffs to submit bloated, and grossly excessive, fee requests to the courts, with the expectation that the courts will reduce the request to a smaller, yet profitable, level. Established case law condemns this practice, and this Court should adopt these precedents as the law of the Commonwealth. To ensure the proper application of First Amendment principles and appropriate fee awards, this Court should grant further appellate review to review the decision and judgment of the Appeals Court.

II. STATEMENT OF PRIOR PROCEEDINGS

T&D commenced this action in Suffolk Superior Court on November 16, 1994 by filing a twenty-seven page complaint and a request for injunctive relief against Revere, the Zoning Board of Appeals of the City of Revere, Edward Elfman, Alfred Buccilli, Anthony Giannino, Peter Lattanzi, and John J. Verrengia, as members of the Board of Appeals and Joseph Ferruzzi, as Building Inspector of the City of Revere. Record Appendix ("App") 11-37. At the time of the filing of the complaint, T&D had pending before the Revere Board of Appeals an appeal from the denial of a sign permit for its operation from the Revere Building Inspector. App. 42. T&D proposed to **[2]** ... and is not an appropriate way to interpret a statute. See e.g. *First National Bank of Boston v. Attorney General*, 371 Mass. 773, 789-790 (1977). These considerations render the expert testimony unusable, and the Appeals Court failed to consider these factors in its statement of facts. Aside from these considerations, the Appeals Court's statement of facts is largely accurate.

IV. STATEMENT OF ISSUES FOR FURTHER APPELLATE REVIEW

1. Whether the Appeals Court correctly applied the "independent review" standard in evaluating the trial testimony?

2. Whether the Appeals Court correctly upheld the conclusion of the Trial Judge that there were no areas in the industrial district in Revere where T&D could locate its store in compliance with the ordinance?

3. Whether the Appeals Court's conclusion that there were no reasonable alternative avenues of communication open to T&D was erroneous where it was undisputed that the ordinance permitted numerous conventional video stores in Revere to offer the same adult videos as the ones sold by T&D?

4. Whether T&D's request for an award of attorneys fees was so excessive as to require a denial of all fees under the rule of *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991)? **[9]** . . .